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No. 83-

In the Supreme Court of the United States

October Term, 1983

PRIMO MOLLICA, *Petitioner,*

v.

UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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October, 1983

QUESTIONS PRESENTED

Petitioner's probation was revoked and a prison sentence imposed. A three-judge court of appeals panel unanimously vacated and remanded, but the ten active judges of the Circuit granted rehearing *in banc*. Although nine of the judges concluded that remand was necessary to protect probationer's rights, the *in banc* court felt constrained to affirm the probation revocation in the absence of a single rationale commanding a majority of those voting.

(1) Did the court of appeals' *per curiam* judgment of affirmance properly reflect the rule of decision represented by the five filed opinions of the judges?

(a) Where nine of ten judges agree that the trial court's judgment is wrong, can an affirmance be justified by the absence of a majority rationale?

(b) Do the five filed opinions of the judges, in fact, reveal a majority rationale for remand?

(2) Does an appellate court's affirmance of a judgment imposing a five-year prison sentence notwithstanding the conclusion of nine of the ten judges that further proceedings were required to protect defendant's rights violate due process and civilized standards of procedure?

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Primo Mollica respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 17, 1983.

OPINIONS BELOW

The opinion of the court of appeals sitting *in banc* (A.1) is reported at 712 F.2d 826. No opinion was rendered by the district court.

JURISDICTION

The judgment of the court of appeals sitting *in banc* was entered on June 17, 1983 (A.61). A timely petition for

rehearing was denied on July 20, 1983 (A.58). On September 6, 1983, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including October 18, 1983 (Application No. A-161). Jurisdiction of this Court to review the judgment in question is conferred by 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On March 5, 1976, Primo Mollica, the petitioner, pleaded guilty in federal district court to violations of 18 U.S.C. §1955 (conducting an illegal gambling business), 18 U.S.C. §1511 (conspiracy to obstruct law enforcement with intent to facilitate an illegal gambling business) and 18 U.S.C. §§1961-1963 (RICO). On May 11, 1976, Mollica was sentenced to five years' imprisonment and fined $15,000. Imposition of sentence, however, was suspended and petitioner was placed on a five-year term of probation. One of the conditions of this probation required Mollica to refrain from violating any state law.

On February 18, 1981, Pittsburgh police officers conducted a search of a residence belonging to one Donna Stagno. During the course of this search the police seized evidence allegedly implicating Mollica in a bookmaking operation. The following day, petitioner was charged by Pennsylvania authorities with operation of a lottery, bookmaking and conspiracy.

(a) The Revocation Proceedings.

On April 27, 1981, federal probation officials petitioned the United States District Court for the Western District of Pennsylvania to revoke Mollica's probation,

alleging a violation of the probationary conditions (violation of state law).[1] A hearing on the petition was set for May 8, 1981, two days before the five-year term of probation was due to expire.

At the hearing, petitioner sought (i) suppression of the evidence seized by the Pittsburgh police and (ii) postponement of the probation proceedings until after the disposition of the state charges—or, in the alternative, the grant of use immunity so that he could testify freely in the federal proceedings. Both requests were denied, the former on the ground that the exclusionary rule was inapplicable to probation revocation proceedings, and the latter because of the trial judge's concern that postponement could result in his loss of jurisdiction by virtue of the five-year maximum probationary period prescribed by 18 U.S.C. §3651.[2] As a consequence of the court's refusal either to postpone the hearing or to confer use immunity, Mollica chose not to testify at the revocation hearing. The bookmaking material seized by the Pittsburgh police was received in evidence, and on that basis the district court found that Mollica had violated the Pennsylvania lottery and bookmaking statutes, revoked his probation and imposed a five-year term of imprisonment.[3] An appeal followed.

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[1]Federal officials also charged Mollica with failure to notify his probation officer immediately of any change in his residence, but that charge was subsequently dismissed by the district judge (A.5 n.1).

[2]Although counsel for Mollica suggested to the court that the commencement of the federal proceeding tolled the running of the five-year period, the Assistant U.S. Attorney disagreed and the judge, stating his belief that the jurisdictional defect was not waivable, rejected the suggestion.

[3]Although the hearing was conducted prior to the expiration of the five-year probationary term, the revocation order was issued on May 18, 1981, eight days after the expiration.

(b) The Court of Appeals—Three Judge Panel.

A three judge panel of the Third Circuit (Judges Gibbons, Weis and Garth) heard oral argument on February 4, 1982. Although petitioner raised a number of issues, central to his appeal were: (i) the propriety of the trial judge's refusal to grant either a postponement of the federal proceedings pending resolution of the state trial or use immunity to enable Mollica to testify freely at the revocation hearing; and (ii) the applicability of the exclusionary rule to probation revocation proceedings.

On May 12, 1982, the panel filed its opinion. By a 2-1 vote it rejected the applicability of the exclusionary rule, but all three judges agreed to the adoption of a supervisory rule requiring that, in the absence of a request by a probationer or a showing of compelling need by the Government, probation revocation proceedings should await the resolution of the criminal charges upon which those proceeding are based. If, however, the revocation proceedings had to be held prior to the disposition of the criminal charges, the defendant would have to be given use immunity.

In its May 12, 1982 judgment, the court concluded, however, that because its approach represented a new position by the circuit, the ruling would be applied prospectively only and could not, therefore, serve as a basis for reversal of Mollica's revocation. Appellant quickly moved for rehearing on this determination and the three judges vacated their May 12 opinion. On July 7, 1982, the three judges unanimously voted to remand with directions to either postpone Mollica's probation revocation hearing until after the state criminal trial or to grant him use immunity.

On August 10, 1982 the Third Circuit granted rehearing *in banc*.[4]

(c) Intervening Factual Developments.

On August 13, 1982, following the grant of the petitions for *in banc* rehearing in the Third Circuit but prior to reargument, the Court of Common Pleas of Allegheny County, Pennsylvania granted petitioner's motion to suppress the fruits of the Pittsburgh police's search and dismissed the State's charges against him.[5]

(d) The In Banc Decision.

In its *in banc* decision issued June 17, 1983, the Third Circuit was severely fragmented, filing six different opinions. Although all ten judges concluded that the trial judge committed error and nine felt that the error required remand, they were unable to agree on the instructions to be given to the district judge as to the manner in which he was to proceed. On this basis, the Court affirmed.

Although petitioner is respectfully aware of the admonition in Supreme Court Rule 21.1(g) that the statement of the case be concise, counsel believes it to be critical to an understanding of this petition that the positions of each of the ten judges be understood. To this end, a breakdown of the voting is required:

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[4]Both parties petitioned for the *in banc* rehearing, the Government on the postponement/use immunity issue which it had lost 3-0, and the petitioner on the exclusionary issue which he had lost 2-1.

[5]Petitioner filed a Supplemental Appendix with the *in banc* court prior to reargument to inform it of this development (A.5).

(i) Four judges (Gibbons,[6] Aldisert,[7] Garth,[8] and Weis[9]) voted to remand so that the district court could either postpone the revocation hearing until after the completion of the state criminal trial on the substantive charge giving rise to the petition for revocation or in the alternative, confer use immunity on the probationer so that he could freely testify in the federal proceedings. [This position is hereinafter referred to as the postponement/use immunity view.]

(ii) Three judges (Adams, Hunter, and Becker[10]) believed that petitioner's right to testify was compromised by the district court's erroneous fear of losing jurisdiction and voted to remand to enable defendant to testify now that the state criminal charges have been dismissed.

(iii) Two judges (Sloviter[11] and Higginbotham[12]) voted to remand for a suppression hearing consistent with their view that the exclusionary rule is applicable to probation revocation proceedings. Two judges who

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[6]Judge Gibbons expressed his views in a dissenting opinion (A.42-47).

[7]Judge Aldisert joined Judge Gibbons' dissent.

[8]Judge Garth expressed his views in a dissenting opinion (A.7-30).

[9]Although Judge Weis' name does not appear on any of the opinions of the individual judges, a footnote in the *per curiam* reveals his vote (A.6 n.2). (*See also* A.20, where Judge Garth notes that Judge Weis has joined with him on the issue in question.)

[10]Judge Adams filed a dissent in which Judges Hunter and Becker joined (A.49-57).

[11]Judge Sloviter expressed her views in an opinion concurring in the result (A.48).

[12]Judge Higginbotham joined none of the individual opinions filed but his vote is revealed in a footnote to the *per curiam* (A.6 n.4).

voted to remand on the postponement/use immunity issue (Gibbons and Aldisert) also voted for a remand for a suppression hearing.[13]

(iv) One judge (Seitz[14]), although concluding that the failure to grant postponement "clearly is inconsistent with a sound exercise of discretion," believed that because the state criminal charges had been dismissed, "remand would be wholly ineffectual in affording Mollica the remedy to which his is entitled, a proper exercise of the district court's discretion concerning whether to postpone his probation revocation hearing or grant him use immunity." (A.41). For this reason, Chief Judge Seitz voted to affirm.

Faced with what they viewed as a division which "cannot be reconciled so as to yield a majority vote for a remand with consistent instructions to the district court as to the manner in which it is to proceed," and believing that the absence of such a majority precluded reversal (A.6-7), the judges filed a *per curiam* affirmance.

Seven dissents were filed from the *per curiam* decision:

(i) Three judges (Adams, Hunter and Becker) opposed the *judgment* on the ground that affirmance was "[i]ndeed the only disposition that appears inconsistent with the various opinions..." (A.57).

(ii) Two judges (Garth and Weis[15]), although agreeing that the lack of a majority view mandated a

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[13]*See* Judge Gibbons' dissenting opinion (A.42-47).

[14]Chief Seitz's opinion concurring in the result appears at A.30-42.

[15]Judge Weis' view on this is somewhat unclear, *see* n.9, *supra*, but is clarified somewhat in his subsequent vote on the sur petition for rehearing (A.60).

judgment of affirmance (A.19-20), dissented from the judgment on the postponement/use immunity issue (A.25, 30).

(iii) Two judges (Gibbons and Aldisert), although believing the judgment "technically correct," dissented from the affirmance on both the postponement/use immunity and exclusionary rule issues (A.42).

(iv) An eighth judge (Sloviter) enigmatically concluded her opinion by stating: "I would remand for the purpose of directing the district court to hold a suppression hearing. Since a majority of the court has not accepted that position, I vote to affirm." (A.48).[16]

(e) The Sur Petition for Rehearing.

Petitioner immediately filed for rehearing of the *in banc* ruling, arguing that:

(i) In view of the individual views of the judges, the judgment was unsupportable (Petition for Rehearing at 12-15).

(ii) In view of the dismissal of the state charges, petitioner intended to testify without immunity on remand (thus, the district judge would not be left without direction) and postponement was no longer needed (Petition for Rehearing at 10).

On July 20, 1983, the Third Circuit, by a vote of 6-4, denied the petition for rehearing (A.58-60). The majority wrote no opinion. Judge Adams, joined by Judges Hunter and Becker, voted to rehear on the ground that the court's disposition was: (i) manifestly unfair and inconsistent with

[16]Whether Judge Higginbotham voted to affirm, like Judge Sloviter, or dissented on the exclusionary rule issue like Judges Gibbons or Aldisert, is not apparent from the decisions filed.

the federal courts' role in protecting constitutional rights; and (ii) inconsistent with the approach taken by the Supreme Court in *Guardians Ass'n. v. Civil Service Comm'n.*, ____ U.S. ____, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983). Judge Weis voted to rehear because he believed that petitioner's willingness to testify had brought about a significant change in the posture of the case (A.60).

REASON FOR GRANTING THE WRIT

THE *IN BANC* DECISION OF THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

Despite the fact that nine of its ten judges believed remand necessary for the protection of petitioner's rights, the United States Court of Appeals for the Third Circuit issued a judgment affirming on the ground that no *single* justification for remanding commanded a majority of the Court. This disposition rested upon both an erroneous abstract jurisprudential proposition (*see* [a], *infra*) and an unsupportable factual assumption (*see* [b], *infra*). It ignored the settled practice of this Court in its issuance of plurality decisions and misconceived the proper role of an appellate court in reviewing criminal convictions.

The primary responsibility for the proper functioning of the federal judiciary rests on this Court. *See Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) (reversing judgment of district judge who remanded properly removed case to state court because of crowded condition of his docket). Where, as here, the ruling sought to be reviewed involves the administration of criminal justice, this responsibility takes on added weight. *McNabb v. United States*, 318 U.S. 332, 340 (1943). This Court's acknowledged "duty to [maintain] civilized standards of procedure," *id.* at 340, precludes the imposition of a five-year prison sentence on such a record. A writ of certiorari should be granted to correct the Third Circuit's unprecedented departure from the accepted course of appellate conduct.

[a] Vacating a Criminal Conviction Does Not Demand a Single Ratio Decidendi So Long As the Judges Are United In Their View That the Trial Court Committed Reversible Error.

In its *per curiam* opinion the court of appeals recognized that "a majority vote" was necessary to reverse the judgment of the district court (A.7). Although a majority of the court favored reversal, three separate rationales for reversing existed, none of which allegedly commanded a majority vote (*but see* [b], *infra*). This, concluded the *per curiam*, precluded reversal. Such a determination comports with neither history, logic nor contemporary practice.

The ultimate step taken by a court is its judgment. The statement of the reasons for its decision is its rationale or opinion. When, in any case, separate rationales are given, they may form a single judgment notwithstanding that each opinion is grounded on a different reason. The difference in reason, however, is not a difference in result. J. Ram, *The Science of Legal Judgment* 53 (1871). The issue placed before the Third Circuit concerned whether the trial judge had erred in his conducting of the probation revocation proceedings. All ten judges concluded that error had been committed (although one, Chief Judge Seitz, concluded that the error was not correctable). The lack of a supporting majority rationale did not impair the effect of the court's collective judgment. *See* Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756, 758 (1980).

An appellate court performs two functions. It resolves the particular controversies that come before it, and it provides guidance for lower courts in deciding similar cases in the future. A court's judgment serves the former

function. Its opinion serves the latter. *See* J. Davis and W. Reynolds, *Juridicial Cripples: Plurality Opinions in the Supreme Court*, 1974 Duke L.J. 59, 62. While spirited debate might be expected as to which function is abstractly of greater import, the appropriate resolution of any tension between the two goals appears self-evident when a person's liberty is at issue. At stake in a criminal case is our interest in the dignity of the individual and the maintenance of a free society. In overseeing trial court proceedings, appellate courts serve as symbols of the respect our legal system accords to the individual. They provide visible assurance to the accused and society that the criminal law is being administered fairly and lawfully. Appeals symbolize deliberative, personalized consideration. In order that appeals be conducted in ways to insure that the reality is consistent with the symbolism, the distinguished authors of a major study of the appellate process remind us that the correctness of a trial judge's action must serve as the reviewing court's primary concern:

> The central purpose of a criminal appeal is to insure that the trial court decision was reached fairly and accurately. The lack of precise uniformity in doctrinal application, though not unimportant, is relatively of less concern. The appellate court's mission is to provide assurance that the defendant was convicted and sentenced on adequate evidence and without prejudicial error at trial or in the preliminary proceedings. *In short, the chief function of a criminal appeal is to see that appellant was not done an injustice.*

P. Carrington, D. Meador & M. Rosenberg, *Justice on Appeal* 58 (1976) (emphasis supplied.)

In the instant case, all of the judges concluded that petitioner had been done an injustice. Nine of the ten

concluded that remand was needed to cure the prejudice. An affirmance under such circumstances demonstrates a misunderstanding of an appellate court's role. While a reversal might have frustrated the court's role of providing guidance for lower courts (*but see* [b], *infra*), the contrary result is inconsistent with the court's primary duty to protect against imprisonment resulting from manifestly unfair trial proceedings. As Judges Adams, Hunter and Becker noted in their dissent below, "[i]t is scant consolation to Mollica that nine judges. . . have concluded that his rights may have been violated in a proceeding which imposed a five year sentence" (A.57).

In resolving its dilemma, the Third Circuit had only to look to this Court for guidance. Counsel has examined every criminal decision of this Court from 1970 to the present. *In no case* was a conviction affirmed in the face of a majority determination that reversible error or errors had been committed. Quite to the contrary, this Court has, without exception, reversed in the light of such a majority, despite the absence of a majority rationale.

Defining a "true" plurality decision as one with at least "two distinct rationales that will justify the result reached in a case, neither of which commands a majority," Note, *Plurality Decisions and Judicial Decisionmaking*, 94 Harv. L. Rev. 1127, 1130 (1981), one finds that between 1970 and 1980, this Court handed down 74 "true" plurality decisions. *Id.* at 1130 n. 20. (*See also* the listing of these decisions in 94 Harv. L. Rev. at 1147.) A survey of these recent so-called "no-clear majority" decisions (Comment, *Supreme Court No-Clear Majority Decisions*, 24 U. Chic. L. Rev. 99 (1956); Comment, *A Suggestion for the Prevention of No-Clear Majority Decisions*, 46 Tex. L. Rev. 370 (1968)) reveals nearly two dozen instances of criminal

convictions or sentences vacated in the absence of a majority rationale.[17] Implicitly contained therein is the message which the court of appeals failed to hear—affirmance of a judgment of conviction is not properly premised on the lack of a uniting *ratio decidendi* where a majority of the court finds reversible error. The contrary conclusion below is without precedent and calls for exercise of this Court's supervisory power.

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[17] A compilation of the decisions (with citation and vote) appears in Appendix B. Illustrative of these cases are *Welsh v. United States*, 398 U.S. 333 (1970); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); and *Connecticut v. Johnson*, ___ U.S. ___, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983).

In *Welsh*, petitioner was convicted of refusing to submit to induction into the Armed Forces despite his claim for conscientious objector status under §6(j) of the Universal Military Training and Service Act. Four justices construed §6(j) to exempt petitioner from military service. A fifth rejected such a construction but concluded that §6(j) read without the plurality's construction ran afoul of the First Amendment (Opinion of Harlan, J., concurring in the result). The conviction was vacated 5-3.

In *Moore*, petitioner was convicted of a criminal violation of a housing ordinance. Four justices concluded that the ordinance violated defendant's substantive due process rights. A fifth concluded that it constituted a taking of property without due process and without just compensation (Opinion of Stevens, J., concurring in the result). The conviction was set aside by a 5-4 vote.

In *Johnson*, petitioner was convicted following a jury trial in the Connecticut Superior Court. The Connecticut Supreme Court reversed on the basis of an erroneous jury instruction. This Court affirmed 5-4. Four justices held that the error in instructions was so basic that it could never be treated as harmless error. A fifth found that the case did not raise a federal question but joined in the judgment allowing the Connecticut high court's reversal to stand (Opinion of Stevens, J., concurring in the judgment).

[b] The Five Filed Opinions of the Judges Below Contain a Common Denominator for Remand.

The opinions filed below reflect and engender no small amount of confusion. A *per curiam* judgment of affirmance is filed with seven judges dissenting (Adams, Hunter, Becker, Aldisert, Gibbons, Garth and Weis). An eighth judge believes remand necessary but votes to affirm "[s]ince a majority of the court has not accepted [her] position" (Sloviter).[18] A ninth judge joins no opinion but expresses his view only through a footnote in the *per curiam* (Higginbotham) (A.6 n.4). Finally, the tenth judge (Seitz) finds probationer "entitled" to a remedy but concludes that the dismissal of the state charges renders all remedies "wholly ineffectual" (A.41).

A *per curiam* is designed to reflect the highest common denominator of majority opinion. *See, e.g., Furman v. Georgia*, 408 U.S. 238 (1972). The one filed below does not. "Indeed," as Judge Adams notes in his dissent, "the only disposition [clearly] inconsistent with the various opinions is an affirmance" (A.57). The court of appeals, however, sought to justify this disposition by the absence of a "necessary" majority rationale to reverse. Not only was such a rationale not necessary (*see* [a], *supra*) but it was present in the opinions of at least seven judges voting to remand in order to give Mollica the opportunity to testify.

Judges Adams, Becker and Hunter "would remand to ensure that probationer's right to testify was not compromised by the lower court's erroneous concern regarding its

[18]Under such a theory, opinions would never contain dissents.

jurisdiction" (A.57).[19] Judge Garth (joined by Judges Aldisert, Gibbons and Weis) does not foreclose that option. It is true that he expresses concern that no purpose would likely be served by such a remand "because in the almost certain event that Mollica chose not to testify" the issue of postponement/use immunity would again confront the district judge (A.25 n.5). But Mollica *is willing* to testify. That representation was made at oral argument (A.49) and reaffirmed in the sur petition for rehearing (A.59, 60). The district court will not be left on remand without direction. Judge Garth would afford relief that Mollica neither needs nor desires in view of the intervening dismissal of the state charges against him. "The judicial power does not extend to the determination of abstract questions." *Ashwander v. TVA*, 297 U.S. 288, 324 (1936). Legal principles should be tailored to the issues actually before the court. Although four judges may believe that probationer is entitled to use immunity, his willingness to forego that protection in no way ought to preclude his opportunity to testify upon remand. Such a resolution comports with the view of seven judges that Mollica should have an opportunity to be heard.

The decision below is, in a number of respects, reminiscent of the disposition in *Estate of Wilson v. Aiken Industries, Inc.*, 477 Pa. 34, 383 A.2d 808 (1978). A Pennsylvania trial court had concluded that defendant violated contractual and fiduciary duties and awarded plaintiff damages. Three judges of the Supreme Court of Pennsylvania wished to reverse the finding of liability. Three others voted to affirm on liability but would have vacated the damages award. The court, finding itself "equally

[19]Judge Weis joined this group in his statement for rehearing (A.60).

divided," affirmed. The losing party sought certiorari, alleging a deprivation of federal due process. The due process issue, however, had not been raised below, leaving this Court with no federal question. Certiorari was denied. 439 U.S. 877 (1978). Justice Blackmun's concurrence in this denial is instructive here. Agreeing that no federal issue was presented, he nonetheless described the holding below as "strange," *id.* at 877, "inexplicable" to many laymen if not to some lawyers, *id.* at 878, and noted that:

> "when a State's highest court unanimously *agrees* that a judgment is wrong but nevertheless affirms that judgment. . . I am left with substantial discomfort."

Id. at 879 (emphasis in original).

Justice Blackmun's acknowledgment of the inability of the United States Supreme Court to cure the state court's error did not prevent his exhortation to the state to correct this "obviously, and concededly, unjust result." *Id.* at 879-880.[20]

In the instant case the responsibility to correct this even greater injustice, resulting in a five year prison sentence, rests on the shoulders of this Court. If it does not act, "there will be," as Justice Blackmun concluded in *Estate of Wilson*, "new recruits to be added to those members of the public who already are inclined to agree with Mr. Bumble's well-known remark."[21] 439 U.S. at 880.

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[20]The Supreme Court of Pennsylvania subsequently entertained an application for reargument filed out of time and entered an order remanding for a new trial on damages. 482 Pa. 625, 394 A.2d 497 (1978).

[21]"'If the law supposes that,' said Mr. Bumble, '. . . the law is a ass—a idiot.'" C. Dickens, *Oliver Twist* 377 (1912).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 17, 1983.[22]

Respectfully submitted,

JULIAN N. EULE
Counsel for Petitioner

October, 1983

[22]Petitioner believes that this case is appropriate for summary disposition and requests that, as an alternative to setting the case for briefing and argument, the Court summarily vacate the judgment entered below and remand with instructions to reverse and permit further proceedings at which petitioner will have an opportunity to testify.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1936

UNITED STATES OF AMERICA

v.

JOHN BAZZANO, JR. a/k/a "JOHNNY", a/k/a "J"; JOSEPH DE MARCO a/k/a "JOE"; JOSEPH CHARLES YIMIN a/k/a "BULL"; CHARLES PATRICK KELLINGTON a/k/a "CHUCK"; FRANCIS DATTALO a/k/a "FRANK", a/k/a "HOB"; ATTILIO POLICASTRO a/k/a "FLAT TOP"; PRIMO VICTOR MOLLICA a/k/a "XG"; JOHN FRANKLIN MATZ a/k/a "JACK", a/k/a "MAYOR"; DAVID RANKIN GUFFEY a/k/a "CHIEF", a/k/a "CLAIRTON CHIEF"; JOHN REGIS WARD a/k/a "JP", a/k/a "WARD"; PETER PAUL ORSINI a/k/a "PETE", a/k/a "PETE ORSI"; DOMINIC PAUL SERAPIGLIA a/k/a "WILSON CONSTABLE"; THOMAS C. POLJAK a/k/a "ELIZ CHIEF"; GEORGE B. HINES a/k/a "ELIZ CONSTABLE"

Primo Mollica, *Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(Criminal No. 75-00192-07)

Argued February 4, 1982

Before: GIBBONS, WEIS and GARTH, *Circuit Judges*

Opinion Filed May 12, 1982, Vacated June 17, 1982

Opinion Re-filed July 7, 1982, Vacated August 10, 1982

Petition for Rehearing Granted August 10, 1982

Reargued In Banc: November 8, 1982

Before: SEITZ, *Chief Judge*,
ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH,
HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

(Opinion Filed: June 17, 1983)

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OPINION ANNOUNCING THE JUDGMENT OF THE COURT

PER CURIAM:

Primo V. Mollica appeals from an order entered on May 18, 1981 by the United States District Court for the Western District of Pennsylvania, revoking his probation and imposing a term of five years' imprisonment. For the

reasons hereafter expressed, the judgment of the district court will be affirmed.

I.

On March 5, 1976, Mollica pleaded guilty to violations of 18 U.S.C. §1955 (conducting an illegal gambling business), 18 U.S.C. §1511 (conspiracy to obstruct law enforcement with intent to facilitate an illegal gambling business), and 18 U.S.C. §§1961-1963 (RICO). On May 11, 1976, he was sentenced to five years' imprisonment and fined $15,000. Mollica's prison sentence was, however, suspended and he was placed on a five-year term of probation pursuant to 18 U.S.C. §3651.

On February 19, 1981, Mollica was charged by Pennsylvania authorities with operation of a lottery, bookmaking, and conspiracy, in violation of 18 Pa. Cons. Stat. §§5512, 5514, and 903, respectively. Federal probation officials thereupon, on April 27, 1981, petitioned the district court to revoke Mollica's probation, alleging that Mollica had violated two of the conditions of his probation: that he refrain from violating any federal, state, or local law, and that he notify his probation officer immediately of any change in his residence. A hearing on the petition was set for May 8, 1981, two days before Mollica's five-year term of probation would expire.

At the hearing on May 8, Mollica sought to postpone the probation revocation proceedings until after the disposition of the state charges. The district court refused to delay the revocation proceedings because of its concern that such a postponement could result in its loss of jurisdiction over Mollica by virtue of the expiration of the five-year maximum probationary period prescribed by 18 U.S.C. §3651. The court also denied Mollica's motion to suppress evidence that had been seized by Pittsburgh police officers during a search conducted on February 18, 1981, the court holding that even if the search war-

rant was defective, as Mollica alleged, the exclusionary rule did not apply to probation revocation proceedings.

At the revocation hearing, a Pittsburgh detective testified that he had received information from an informant that Mollica was conducting a telephone gambling business at the residence of Donna Stagno. After obtaining a search warrant, the detective and two other officers went to the Stagno residence, apprehended Mollica and Stagno, and conducted a search of the house.

In what appeared to be the master bedroom, the police found two telephones and numerous sheets of paper and adding machine tapes containing numbers and the names of college and professional basketball teams. An FBI expert on sports betting operations testified that the sheets found in the bedroom represented incoming and outgoing bets for a two-week period totaling in excess of $1 million. The police also found in the room a sheet containing the name and telephone numbers of Mollica's probation officer, and Mollica furnished the officers with a key to a desk drawer in the room which contained $17,000 in cash. Prior to leaving the residence, Mollica, referring to Stagno, said to the police, "Why take her? It's all my stuff." However, a handwriting expert testified that the numbers on the sheets found in the bedroom were written by two different persons, neither of whom was Mollica.

Mollica unsuccessfully sought to have the court grant use immunity to him, to Stagno, and to Jerry Fimmano, who testified to having resided in the Stagno residence in early 1981 but who invoked his fifth amendment privilege against self-incrimination when asked about the gambling records found in the bedroom.

On May 18, 1981, eight days after the expiration of the five-year probationary period, which began May 11, 1976, the district court found that Mollica had violated the Pennsylvania lottery and bookmaking statutes, revoked his probation, and imposed a five-year term of

imprisonment, the maximum sentence the court could at that time have imposed.[1]

In a Supplemental Appendix filed with this court prior to argument before the court *in banc*, we were informed that the state court had granted Mollica's motion for suppression of certain evidence and, having thereby suppressed the only evidence available to the Commonwealth, thereafter dismissed Mollica's state proceeding on the ground of insufficient evidence.

In his appeal, Mollica now asserts:

(1) that the fourth amendment exclusionary rule is applicable to a probation revocation proceeding and thus that the district court erred in refusing to conduct a suppression hearing;

(2) that the district court was without power to revoke his probation and to reimpose his original five-year prison sentence when the maximum five-year period of probation allowed under 18 U.S.C. §3651 had already expired at the time of the revocation;

(3) that even if the district court had the authority to revoke his probation, the court erred in not postponing the probation revocation hearing until after trial of the state charges underlying the revocation proceeding, or, alternatively, in not granting him use immunity in the revocation hearing;

(4) that the district court erred in reimposing his original sentence without stating its reasons for doing so;

(5) that the district court erred in not ordering disclosure of the identity of the informant whose information led to the search and seizure of the gambling materials; and

(6) that the district court erred in refusing to grant immunity to defense witnesses Stagno and Fimmano.

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1. The court dismissed the charge that Mollica had violated his probation by failing to notify his probation officer of a change of residence.

II.

For the reasons expressed in Judge Garth's separate opinion which follows, a majority of the court holds today that the Fourth Amendment exclusionary rule does not apply to probation revocation proceedings.

Further, the court unanimously holds today that the district court did not err in holding that it had power to revoke Mollica's probation, in failing to state its reasons for the sentence, in not ordering disclosure of the informant's identity, or in refusing to grant immunity to defense witnesses Stagno and Fimmano. As to these issues, the court unanimously agrees that there was no error, for the reasons set forth in Judge Garth's separate opinion.

The court is divided with respect to the remaining issue, that is, whether the district court erred in failing either to postpone the probation revocation hearing until after trial of Mollica's state charges or to grant Mollica use immunity if he chose to testify at the revocation hearing. This division results in an insufficient number of votes to reverse the district court. Four judges[2] would accept Mollica's argument and would therefore reverse the district court's judgment and remand for a hearing consistent with the principles urged on the court by Mollica. Three judges[3] would remand the case to the district court but for a more limited purpose, and would not authorize the district court to make use immunity available to Mollica. Two judges[4] would remand only for a Fourth Amendment suppression hearing. That relief, however, is no longer available, in light of the court's

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2. Judges Aldisert, Gibbons, Weis and Garth.

3. Judges Adams, Hunter and Becker.

4. Judges Higginbotham and Sloviter. Judges Aldisert and Gibbons, who would remand for a hearing at which use immunity would be made available to Mollica, *see* note 2, *supra*, would also remand for a suppression hearing, consistent with their view that the exclusionary rule is applicable to probation revocation proceedings.

holding today that the exclusionary rule is inapplicable to probation revocation proceedings. One judge[5] would not remand for any purpose. On analysis, it is apparent that the differing grounds on which these various votes for remand are rested cannot be reconciled so as to yield a majority vote for a remand with consistent instructions to the district court as to the manner in which it is to proceed. Because a majority vote of this court is necessary to reverse the judgment of the district court, and because no such majority exists, the order of the district court denying postponement or use immunity cannot be reversed.

Accordingly, having determined that the district court did not err in its rulings as to five of the issues raised by Mollica, and there being no majority to reverse the district court as to its ruling on the sixth (denying postponement or use immunity), the May 18, 1981 order of the district court will be affirmed.

GARTH, *Circuit Judge*:

The district court, among other rulings leading to the revocation of Mollica's probation, held that the fourth amendment exclusionary rule did not apply to probation proceedings; that it was not required to postpone its revocation proceedings until after Pennsylvania had concluded its own state proceedings against Mollica, nor, alternatively, was it required to make use immunity available to Mollica in the event Mollica sought to testify in the federal revocation hearing. I agree with the district court in all of its rulings, except its ruling denying postponement/use immunity.

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5. Chief Judge Seitz.

In that one respect, I believe that the district court erred and, accordingly, that a remand should now be ordered for additional proceedings consistent with the discussion of postponement/use immunity set out in Part III, *infra* of this opinion. Because the court today affirms the district court judgment rather than reversing that judgment and directing a remand, I am obliged to dissent. My dissent from the court's affirmance, however, is limited solely to the court's failure to remand for the application of postponement/use immunity principles.

I.

Applicability of the Exclusionary Rule to Probation Revocation Proceedings

Mollica argues that the fourth amendment exclusionary rule is applicable in probation revocation proceedings, and that the district court therefore erred in refusing to conduct a suppression hearing with regard to the evidence obtained as a result of the search of the Stagno residence. We do not agree.

Of the seven courts of appeals that have considered the question whether the exclusionary rule is applicable to probation revocation proceedings, six have concluded that it is not. *See United States v. Frederickson*, 581 F.2d 711, 713 (8th Cir. 1978) (per curiam); *United States v. Winsett*, 518 F.2d 51, 53-55 (9th Cir. 1975); *United States v. Farmer*, 512 F.2d 160, 162-63 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); *United States v. Brown*, 488 F.2d 94, 95 (5th Cir. 1973) (per curiam); *United States v. Hill*, 447 F.2d 817, 819 (7th Cir. 1971); *United States ex rel Sperling v. Fitzpatrick*, 426 F.2d 1161, 1163 (2d Cir. 1970) (parole revocation). *But see United States v. Workman*, 585 F.2d 1205, 1211 (4th Cir. 1978) (holding that the rule is applicable).

Despite the substantial weight of authority against the application of the rule, we acknowledge that the question is a close one. Those who have argued in favor

of the rule's applicability to probation revocation proceedings have stressed that since prosecutors frequently use a revocation proceeding as an alternative to trying the probationer on the new criminal charges, the same exclusionary practice should apply in revocation proceedings as does in a criminal trial. They assert that the Supreme Court has consistently applied the exclusionary rule to affirmative proof offered by the government in state and federal criminal trials, and has never exempted from the operation of the rule any adjudicative proceeding in which the government offers unconstitutionally seized evidence in direct support of a charge that may subject the victim of a search to imprisonment.

In addition, proponents of the exclusionary rule argue that probationers, despite their probationary status, still retain the basic constitutional right to be free from unreasonable searches and seizures, and that unbridled police intrusions into probationers' lives would disrupt any effort being made to rehabilitate them. They contend that as the courts create more and more exceptions to the exclusionary rule, the rule will no longer be an effective deterrent to police misconduct because the police will soon come to believe that, notwithstanding the general rule of exclusion, some exception will nearly always be available under which the seized evidence will be admissible. Finally, they assert that application of the exclusionary rule in the probation context is required to prevent the integrity of the legal system from being tainted by the use of illegally obtained evidence.

On the other hand, those who have argued against the application of the exclusionary rule in the context of probation revocation have stressed that the exclusion of unconstitutionally seized evidence in the prosecution of substantive criminal offenses provides a sufficient deterrent to police misconduct. They claim that the exclusion of such evidence from revocation proceedings as well, would add only minimally to the rule's deterrent effect. At the same time, they assert, application of the rule

would tend to obstruct the remedial and protective purposes of the probation system, by depriving the courts of relevant evidence bearing on the extent of the probationer's rehabilitation. Moreover, they contend, it would force probation officers to substitute for the informal process of evaluation of a probationer's rehabilitation the more time-consuming task of amassing formally admissible evidence.

Additionally, those who oppose exclusion note that the probationer differs from the ordinary citizen in that he has less of a right to be free from governmental supervision. They argue that considerations of judicial integrity are present whenever the government seeks to use illegally obtained evidence, yet the Supreme Court has declined to require such evidence to be suppressed in all circumstances. Finally, they observe that the availability of sanctions against police officers who conduct unlawful searches provides an adequate deterrent to such conduct without interfering in the probation process by the drastic exclusionary requirement that would deprive the authorities of relevant information. *See, e.g., United States ex rel. Sperling v. Fitzpatrick, supra*, 426 F.2d at 1164 (opinion of Hays, J.).

After considering these competing arguments, we are persuaded by the reasoning of those courts that have refused to apply the exclusionary rule in probation revocation proceedings. In our view, excluding from such proceedings reliable evidence bearing on a probationer's rehabilitation would contribute little to deterring constitutional violations while impeding society's interest in protecting itself against convicted criminals who have abused the liberty afforded them. Thus, applying the balance of interest analysis, utilized by the Supreme Court in determining whether to extend the exclusionary rule, leads us to hold that the exclusionary rule is inapplicable to probation revocation proceedings.

The balance to be struck between the competing interests involved in determining whether to extend the

exclusionary rule has been clearly spelled out by the Supreme Court. In *United States v. Calandra*, 414 U.S. 338 (1974), faced with the question of whether the exclusionary rule should be extended to grand jury proceedings, the court stated:

> In deciding whether to extend the exclusionary rule to grand jury proceedings, we must weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context.

414 U.S. at 349. This balancing test has been reaffirmed by the Supreme Court in subsequent decisions, *see Stone v. Powell*, 428 U.S. 465, 486-89 (1976); *United States v. Janis*, 428 U.S. 433, 453-54 (1976), and has been applied as well by courts of appeals dealing with the present issue, *see, e.g., United States v. Winsett*, 518 F.2d 51 (9th Cir. 1975) (minimal deterrent effect of extending exclusionary rule to probation revocation proceedings outweighed by dangers the rule would pose to probation system); *United States v. Workman*, 585 F.2d 1205 (4th Cir. 1978) (applying *Calandra* balancing test to conclude that exclusionary rule does apply to probation revocation proceedings).

Of substantial importance in the weighing of the interests involved is the principle that the rule is not a personal constitutional right of the party aggrieved, but rather is a device designed to deter violations of fourth amendment rights. *See Calandra*, 414 U.S. at 348. In clarifying the interests to be balanced the Supreme Court has explained that "[t]he purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim. . . . Instead, the rule's prime purpose is to deter future unlawful police conduct." *Calandra*, 414 U.S. at 347. "The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it." *Unit-*

ed States v. Calandra, supra, 414 U.S. at 347-48 (*quoting Elkins v. United States*, 364 U.S. 206, 217 (1960).

Thus, whether the rule should be extended to probation revocation proceedings must depend on whether its application will significantly enhance the rule's deterrent effect. For, if the marginal increase in deterrence stemming from the rule's application will be slight, then the balance of interests is unlikely to favor applying the rule and thereby depriving revocation proceedings of " 'all the evidence which exposes the truth.' " *United States v. Calandra*, 414 U.S. 338, 351 (1974) (quoting *Alderman v. United States*, 394 U.S. 165, 175 (1969)).

The Supreme Court has noted that empirical determinations of the deterrent effect of the exclusionary rule have shed little light on the questions posed by this balance of interests. *See Janis, supra*, at 449-53 (survey and criticism of empirical studies). As a result, the Court has "relied, instead, on its own assumptions of human nature and the interrelationship of the various components of the law enforcement system." *Janis, supra*, at 459.

When the police conduct a search, their aim generally is to convict the target of the search of a substantive offense, and they know that any unconstitutional conduct on their part incident to the search will be grounds for suppressing the evidence at the defendant's trial. Such evidence, when seized by state police officers, is excludable in both the state criminal trial on the substantive offense, *Mapp v. Ohio*, 367 U.S. 643 (1961), and in any federal criminal trial, *Elkins v. United States*, 364 U.S. 206 (1960). Thus, "the entire criminal enforcement process, which is the concern and duty of these [state] officers, is frustrated," *Janis, supra*, at 448 (footnote omitted), and considerable deterrent effect arises from already existing applications of the exclusionary rule.

In determining whether the incremental deterrent effect of extending the exclusionary rule to various proceedings would be substantial, the Court has inquired into whether use of the evidence in the proceeding in

question "falls outside the offending officer's zone of primary interest." *Janis, supra*, at 458. *See also Tirado v. Commissioner of Internal Revenue*, 689 F.2d 307, 311 (2d Cir. 1982) ("The primary consideration is the relationship between the law enforcement responsibilities and expertise of the seizing officials and the type of proceeding at which the seized material is being offered.")

The "zone of primary interest" for state police officers is the acquisition of evidence for use in criminal proceedings, whether of the state or of the federal government. *Janis, supra* at 458. The interest of state officers is greatest in state criminal proceedings, but extends to criminal proceedings of another sovereign by virtue of the law enforcement officers' interest in achieving some conviction. *See Janis, supra* at 458 (explaining *Elkins v. United States, supra*). Yet the interest of state officers is attenuated to some extent by virtue of the fact that such evidence is used in a proceeding by another sovereign.

In the present case, however, not only is the sovereign conducting the proceeding in question different from the sovereign to which the offending officers are responsible, but the proceeding in question is not the criminal trial which is of primary concern to law enforcement agents. As a result, it is unlikely that state law enforcement agents will be interested in seizing evidence that will be of use in a federal probation revocation proceeding. Thus, in the absence of evidence that the offending agents knew that the target of their search was a probationer,[1] the deterrent effect of excluding the rel-

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1. In this case we do not reach the question whether the exclusionary rule should be applied in a probation revocation proceeding if the police knew or had reason to know that the target of their search was a probationer. *See* United States v. Rea; United States v. Winsett, 518 F.2d 51, 55 (9th Cir. 1975); United States v. Brown, 488 F.2d 94, 95 (5th Cir. 1973) (per curiam). We expressly leave this question open. There is no evidence in the record of this case that the police who conducted the search knew or had reason to know that Mollica was on probation.

evant evidence will be substantially attenuated. *Cf. Janis, supra*, at 457-58.

That the target of the search might be on probation and the seized evidence thus of use in a revocation proceeding is not likely to cross the police officers' minds. In this light, since, in the case of such a typical search and seizure, the possibility of use of any seized evidence in a probation revocation hearing is relatively remote, there would appear to be little added deterrent effect from applying the exclusionary rule in probation revocation proceedings.[2]

Against this minimal increase in deterrence of police misconduct we must weigh "the potential injury to the . . . role and functions of [probation]." *Calandra, supra* at 349. In considering the effect on probation revocation proceedings of extending the exclusionary rule, it must be remembered that because the probationer has already been found guilty of a crime, and his liberty is only "conditional," *United States v. Basso*, 632 F.2d 1007, 1013 (2d Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), a revocation hearing is, in effect, more a resentencing than a taking of rights. As the Supreme Court indicated in *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the "full panoply of rights" due a defendant in a criminal prosecution is not available in a revocation proceeding. *Morrissey v. Brewer, supra*, 408 U.S. at 480. For example, the Government has a lesser burden of proof in revocation proceedings, *United States v. Manuszak*, 532 F.2d 311, 317 (3d Cir. 1976), and the Federal Rules of Evidence (other than with respect to privileges) do not apply, Fed. R. Evid. 1101(d)(3).

These features of probation revocation proceedings do not imply, of course, that probationers do not possess

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2. United States v. Workman, 585 F.2d 1205 (4th Cir. 1978), relied upon by Mollica, in our view greatly overstates the deterrent effect of applying the exclusionary rule in such a specialized context. *See id.* at 1210.

the fourth amendment right to be free from unreasonable searches and seizures, or that that right is not protected by the warrant requirement. *See United States v. Rea*, 678 F.2d 382, 386-88 (2d Cir. 1982); *United States v. Hallman*, 365 F.2d 289 (3d Cir. 1966).[3] Nevertheless, these features of probation revocation proceedings do reflect the fact that the state has a great interest in receiving all information available on the question of whether the probationer has observed the conditions of his probation. As the Supreme Court stated in *Morrissey v. Brewer*, 408 U.S. 471, 483 (1972):

> The State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty. Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts. Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.

Application of the exclusionary rule to probation revocation proceedings would interfere significantly with the state's ability to ensure that conditions of probation were being met. As a result, the state's ability to protect

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3. A refusal to apply the exclusionary rule in probation revocation proceedings would not be inconsistent with this court's decision in United States v. Hallman, 365 F.2d 289 (3d Cir. 1966). In *Hallman*, we did state that "Hallman was not without basic rights because he was a parolee," *id.* at 291, and suppressed evidence seized as a result of an unlawful search. But the evidence in *Hallman* was sought to be used in Hallman's trial on the substantive offense of bank robbery, and not in connection with a revocation of Hallman's parole. *Hallman* is thus readily distinguishable from the instant case.

society from additional antisocial acts committed by probationers, and ultimately its ability to achieve the remedial purposes of the probation system, would be impaired. *See Winsett, supra*, at 54-55.[4]

Accordingly, we conclude that there was no justification for applying the exclusionary rule in the context of Mollica's probation revocation proceeding. As was stated in *United States ex rel. Sperling v. Fitzpatrick, supra*, "The exclusionary rule is believed to be a necessary restraint on the adversarial zeal of law enforcement officials. 'As it serves this function, the rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease.' " 426 F.2d at 1163 (opinion of Hays, J.) (footnote and citation omitted).

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4. The Ninth Circuit in *Winsett, supra*, observed:

> The primary purpose of probation, which has become an integral part of our penal system, is to promote the rehabilitation of the criminal by allowing him to integrate into society as a constructive individual, without being confined for the term of the sentence imposed. . . . An important aspect of our probation system is the placing of certain restrictions on the probationer, such as the requirement that he not associate with criminals or travel outside the judicial district. These conditions serve a dual purpose in that they enhance the chance for rehabilitation while simultaneously affording society a measure of protection. Because violation of probation conditions may indicate that the probationer is not ready or is incapable of rehabilitation by integration into society, it is extremely important that *all reliable* evidence shedding light on the probationer's conduct be available during probation revocation proceedings.
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> Consequently, to apply the exclusionary rule to probation revocation hearings would tend to frustrate the remedial purposes of the probation system

518 F.2d at 54-55 (citation and footnote omitted).

II.

The District Court's Power to Revoke Probation After Expiration of the Five-Year Statutory Period

Mollica argues that, because at the time his probation was revoked, the five-year time limit on probation established by 18 U.S.C. §3651 had expired, the district court lacked subject matter jurisdiction to effect the revocation, even though revocation proceedings had formally begun with a Petition to Revoke Probation *prior* to the expiration of the five-year period.

18 U.S.C. §3651 provides in relevant part:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.
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> The court may revoke or modify any condition of probation, or may change the period of probation.
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> The period of probation, together with any extension thereof, shall not exceed five years.
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> The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.

A later portion of the statute, 18 U.S.C. §3653, provides that as long as a warrant for the arrest of the probationer is issued within the five-year period, the district court may revoke the probationer's probation:

> At any time within the probation period, or within the maximum probation period permitted by section 3651 of this title, the court for the district in which the probationer is being supervised or if he is no longer under supervision, the court for the district in which he was last under supervision, may issue a warrant for his arrest for violation of probation occurring during the probation period.
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> As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.

Thus, the statute suggests that as long as formal revocation proceedings are commenced (by arrest warrant or otherwise) within the five-year period, probation can be revoked, even if the revocation hearing starts and the actual revocation takes place after the end of the five-year period.

Indeed, all the cases support this view. *See Nicholas v. United States*, 527 F.2d 1160 (9th Cir. 1976); *United States v. Strada*, 503 F.2d 1081 (8th Cir. 1974); *United States v. Bartholdi*, 453 F.2d 1225 (9th Cir. 1972). In *Nicholas*, for example, the court stated:

> The district court had jurisdiction to execute the remainder of Nicholas' sentence, even if the five-year probationary period had expired, because a bench warrant had been issued for his arrest within the initial five-year period, and the hearing upon revocation was held within a reasonable time after execution of the warrant.

527 F.2d at 1161 (citation omitted). This court recently rejected an argument similar to Mollica's in the context of parole revocation. *Franklin v. Fenton*, 642 F.2d 760, 764 (3d Cir. 1980) ("Since the original warrant was issued within the petitioner's original term, it could be executed thereafter.")

It is difficult to think of a reason why a court should arbitrarily lose jurisdiction at the end of the five-year statutory period when the alleged probation violation took place within the five-year period and the probationer was formally notified within that period that the Government would seek to revoke his probation. The five-year provision has not been applied mechanically in other contexts; for example, its running has been tolled during periods when the probationer was not in fact under probationary supervision by virtue of his own wrongful act. *See United States v. Workman*, 617 F.2d 48, 51 (4th Cir. 1980); *United States v. Lancer*, 508 F.2d 719, 733-34 (3d Cir.) (in banc), *cert. denied*, 421 U.S. 989 (1975). Thus, since the proceedings to revoke Mollica's probation were commenced within the five-year period of 18 U.S.C. §3651, the revocation of Mollica's probation was not time-barred.

III.

Postponement of the Revocation Hearing; Use Immunity

I preface the following discussion of postponement/use immunity with the caveat that, as the *per curiam* opinion announcing the judgment of the court reflects, the court is divided in its views on this issue, with no one view commanding a majority. Thus the order of the district court from which Mollica appeals must be affirmed.

The discussion that follows in this section adopts the argument advanced by Mollica. That argument, if accepted by a majority of the court, would require a reversal and a remand to the district court for further pro-

ceedings conforming to the principles urged by Mollica and discussed below. However, as noted, no majority exists for this position and the succeeding discussion represents the view only of the author of this opinion and those members of the court, Judges Aldisert, Gibbons and Weis, who have joined with him: a minority. Points of view which differ from the discourse that follows are to be found in the separate opinions of the various members of the court.

A.

Mollica argues that when a probation revocation hearing is held prior to the disposition of related criminal charges, the probationer is faced with a dilemma. If he chooses to testify in the probation revocation hearing, he may compromise his constitutional privilege against self-incrimination in connection with the related criminal proceeding. If he decides not to testify in the revocation hearing, his probation may be revoked even though he may later be acquitted of the related criminal charges. Thus, Mollica argues that the proper procedure is for the probation revocation proceedings to be postponed until after the related criminal charges are resolved, and if postponement is not desired by the Government and the revocation hearing is held first, for the probationer to be given use immunity so that he can testify without penalty in the revocation proceeding. *Cf. Simmons v. United States*, 390 U.S. 377, 389-94 (1968) (defendant's testimony at suppression hearing inadmissible at trial). At this point in time, Mollica's argument is also reinforced by the fact that mere postponement of the revocation hearing would not prejudice the Government because, as we have concluded in Part II, *supra*, revocation proceedings need only be commenced by arrest warrant, petition, or otherwise, within the five-year limitations period of 18 U.S.C. §3651. Thus, the revocation hearing itself would not have to be commenced or

completed within that period. Neither would postponement endanger the public, Mollica argues, because, if necessary and appropriate, a probationer who is accused of violating the terms of his probation can be taken into custody pending the outcome of the revocation hearing, the propriety of which is an issue neither presented by nor addressed on this appeal.

Mollica argues additionally that, even though the state court granted his motion for suppression of the only evidence available to the Commonwealth, and thereafter dismissed the proceeding against Mollica on the grounds of insufficient evidence, this circumstance does not moot the issue presented to us. He points out that the charges were merely dismissed and that *he was not acquitted*. He also points out that, because additional evidence not available to the state when it dismissed his charges might become available as a result of his testimony at a probation revocation hearing, his dilemma, which led to this appeal, would still obtain. Thus, he argues that, even though a postponement of the probation revocation hearing is no longer a realistic alternative because the state action against him has concluded, nevertheless, the possible revival of the state charges still requires our adherence to the procedure which he proposes.

Mollica here does not argue that postponement of revocation hearings or the giving of use immunity are constitutionally required. Courts in numerous cases have held that they are not. *See Ryan v. State of Montana*, 580 F.2d 988 (9th Cir. 1978), *cert. denied*, 440 U.S. 977 (1979); *United States v. Brugger*, 549 F.2d 2 (7th Cir.), *cert. denied*, 431 U.S. 919 (1977); *Flint v. Mullen*, 499 F.2d 100 (1st Cir.), *cert. denied*, 419 U.S. 1026 (1974). *But see Melson v. Sard*, 402 F.2d 653 (D.C. Cir. 1968) (per curiam). Rather, Mollica argues that this court should impose a postponement/use immunity requirement as an exercise of its supervisory power over the district courts in this circuit.

As Mollica notes, there is substantial support for the view that probation revocation proceedings should be postponed until after the disposition of the criminal charges upon which revocation would be based. For example, the ABA's Standards Relating to Probation §5.3 (Approved Draft 1970), provide that

> [a] revocation proceeding based solely upon commission of another crime ordinarily should not be initiated prior to the disposition of that charge. However, upon a showing of probable cause that another crime has been committed by the probationer, the probation court should have discretionary authority to detain the probationer without bail pending a determination of the new criminal charge.

As the commentary to that section explains:

> The relative informality of a probation revocation proceeding, as compared to the trial of an original criminal charge, underlines the danger. Relaxation of rules of admissibility of evidence, the absence of a jury, a lesser burden of proof — factors such as these can lead to an abuse of the proceeding by basing revocation upon a new criminal offense when the offense could not be proved in an ordinary criminal trial. Additional complexity is introduced by the position in which the probationer is put as regards his privilege against self-incrimination: a revocation proceeding before trial of the charge on which it is based well could compromise the assertion of this fundamental constitutional right. . . .
>
> These problems can be minimized if the probation revocation proceeding is postponed until after the disposition of the new criminal charge. The record will then be clear and the possibilities of unfairness to the probationer will have been sharply reduced, particularly as they involve the privilege against self-incrimination. This standard according-

> ly suggests such postponement as an operating policy.

(citations omitted.) *See also* Model Penal Code §301.3 (1962). Indeed, Mollica's probation officer testified at the revocation hearing that it is the standard policy of the United States Probation Office to delay federal probation revocation proceedings until after disposition of pending state criminal charges. App. at 286.

The leading case on this subject is *People v. Coleman*, 13 Cal. 3d 867, 120 Cal. Rptr. 384, 533 P.2d 1024 (1975), in which the Supreme Court of California, exercising its supervisory power over lower California courts, announced that the testimony of a probationer at a probation revocation hearing held prior to the disposition of criminal charges arising out of the alleged violation of the conditions of his probation, and any evidence derived from such testimony, may not be used against the probationer by the prosecution in its case-in-chief on the related criminal charges. *Id.* at 889, 120 Cal. Rptr. at 402, 533 P.2d at 1042. The supreme courts of Alaska, Rhode Island, and Wisconsin have taken similar positions. *See McCracken v. Corey*, 612 P.2d 990 (Alaska 1980) (parole revocation); *State v. DeLomba*, 117 R.I. 673, 370 A.2d 1273 (1977); *State v. Evans*, 77 Wis. 2d 225, 252 N.W.2d 664 (1977). *See also People v. Carr*, 185 Colo. 293, 524 P.2d 301 (1974). The Ninth Circuit in *Ryan, supra*, while declining to hold that use immunity was constitutionally required, recognized the desirability of such a procedure:

> If our opinion as to the wisdom of the Montana rule were dispositive, we might prefer the California procedure, mandated by the state court under its supervisory power, which provides use immunity for a probationer's testimony if it is given at a revocation hearing held prior to trial on criminal charges which were the basis for the revocation proceed-

> ing. . . . It is not unreasonable to conclude that the lesser standard of proof at a revocation proceeding and the objectives of making an accurate determination of revocation charges and a proper assessment of the penalty to be imposed are factors that make it proper for a state to encourage testimony by a grant of use immunity.

580 F.2d at 994 (citation omitted).

B.

I am persuaded by Mollica's argument, and agree that it is the better practice for probation revocation proceedings to await completion of the state criminal trial on the substantive charge giving rise to the revocation proceeding. If the government were to insist, or if the district court decided in its discretion, that probation revocation proceedings must be held prior to the disposition of the criminal charge, I agree that the defendant should be given use immunity to testify in the revocation proceeding. The determination as to which of these courses to follow would necessarily rest in the sole discretion of the district court, which should articulate on the record the reasons for its determination.

If such a practice were to be required in the instant case, we would obviously be obliged to reverse and remand for application of the procedure described. However, as has been pointed out, there is no majority of the court subscribing to Mollica's argument to reverse and remand for application of the procedure he urges upon us. Rather, while some members of the court, who subscribe to this discussion, agree that a remand should be ordered for application of the rule advocated by Mollica, other members of the court would remand, but only for the purpose of ensuring that Mollica's right to testify was

not compromised by the district court's doubts about its jurisdiction.[5]

This division of the court has resulted, as stated by the *per curiam* opinion announcing the judgment of the court, in a judgment affirming the district court's order of May 18, 1981. Because of my conviction that a remand is necessary so that the district court may either postpone the probation revocation hearing until state proceedings have been completed or make use immunity available to Mollica, I disagree with the court's disposition, and therefore dissent.

IV.

Mollica raises several other objections to the probation revocation proceedings before the district court. We reject Mollica's arguments for the reasons that follow.

A.

Statement of Reasons for Imposing Sentence

Mollica contends that the district court should have explained on the record why, after he had successfully completed almost all of his probationary period, it had

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5. If a remand were ordered out of concern that Mollica's right to testify was impaired by the district court's doubts about its jurisdiction, then Mollica would face the same dilemma he formerly faced. He could choose to testify only at the risk of supplying the very evidence that the state needs in order to indict him. It should be remembered that the state, after having excluded the evidence that arose from the search of the Stagno residence, then dismissed charges against Mollica for lack of evidence. Thus, it would appear that on this limited remand Mollica could not testify without furnishing the very evidence the lack of which led to the dismissal of the state charges. I do not think it likely that any purpose would be served by such a limited remand, because in the almost certain event that Mollica chose not to testify, for fear of furnishing evidence to the state, the district court would be placed in exactly the same position it was in after the first hearing.

resentenced him to the five-year term of imprisonment it had originally imposed. Federal appellate courts generally do not require trial courts to state reasons for the imposition of the sentences they impose. *See, e.g., United States v. Vasquez*, 638 F.2d 507, 534 (2d Cir. 1980), *cert. denied*, 450 U.S. 970, 102 S. Ct. 165, 102 S. Ct. 528 (1981); *United States v. Garcia*, 617 F.2d 1176, 1178 (5th Cir. 1980); *United States v. Del Piano*, 593 F.2d 539, 540 (3d Cir.) (per curiam), *cert. denied*, 442 U.S. 944 (1979); *United States v. Thompson*, 541 F.2d 794, 795 (9th Cir. 1976) (per curiam). Although this rule has been criticized by a member of this court, *see, e.g., United States v. Bazzano*, 570 F.2d 1120, 1130-38 (3d Cir. 1977) (Adams, J., concurring in the judgment) (collecting authorities), *cert. denied*, 436 U.S. 917 (1978), we have continued to adhere to it.

Whatever justification exists for requiring a trial court to explain its reasons when initially imposing sentence, there is far less justification for requiring a court to give reasons when it merely reinstates its earlier sentence after finding that the defendant had violated his probation. True, it is not inevitable that courts will reimpose the original sentence upon finding a probation violation, and there may be good arguments in a given case for not doing so. But when a defendant has violated the terms of his probation — even toward the end of the probationary period — it indicates to the court that it erred in its original determination that the defendant did not need to serve his prison sentence in order to be rehabilitated. That being the case, the court is justified, without more, in concluding that it should do now what it could have done initially: impose the original prison term without probation. The probation statute, 18 U.S.C. §3653 (1976), expressly gives the court this option. *See United States v. Lancer, supra*, 508 F.2d at 726-27.

Since Mollica's sentence is within the statutory limits, it is not subject to challenge. *United States v.*

Dansker, 581 F.2d 69, 75 (3d Cir. 1978); *Government of the Virgin Islands v. Richardson*, 498 F.2d 892, 894 (3d Cir. 1974). As the Supreme Court said in *Dorszynski v. United States*, 418 U.S. 424, 443 (1974), "well-established doctrine bars review of the exercise of sentencing discretion." For these reasons, Mollica's objection to his sentence must fail.

B.

Disclosure of Informant's Identity

In *Roviaro v. United States*, 353 U.S. 53 (1957), the Supreme Court recognized that there is a qualified privilege possessed by the Government to refuse to disclose the identify of a confidential informant from whom it has received information about alleged criminal activity. In determining whether the privilege should be sustained, a court must "balanc[e] the public interest in protecting the flow of information against the individual's right to prepare his defense." *Id.* at 62.

Mollica's argument, as to why the identity of the informant here would be useful, is vague. "[M]ere speculation as to the usefulness of the informant's testimony to the defendant is insufficient to justify disclosure of his identity." *United States v. Estrella*, 567 F.2d 1151, 1153 (1st Cir. 1977) (citations omitted). So far as appears, the informant's role in this case was nothing more than that of allegedly providing the police with probable cause for conducting their search, and we have already held in Part II *supra* that the fruits of the search are not subject to suppression even if the search warrant was defective. The evidence of Mollica's guilt consisted primarily of the physical evidence seized during the search. Where an informant's role was in validating a search, disclosure of his identity is not required. *McCray v. Illinois*, 386 U.S. 300 (1967). Mollica has failed to present a convincing argument that the informant played any more important role in the Government's case or in his defense.

C.

Refusal to Grant Defense Witness Immunity

Mollica argues that the district court erred in refusing to grant immunity to defense witnesses Stagno and Fimmano. As a result, both Stagno and Fimmano invoked their fifth amendment privilege when called to the stand. In *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979), this court discussed two situations in which the due process clause might compel the granting of immunity to defense witnesses: one statutory and one judicial.

First, *Herman* noted that in cases where Government actions denying use immunity to defense witnesses were undertaken with the "deliberate intention of distorting the judicial fact finding process," the court has the remedial power to order acquittal unless on retrial the Government grants statutory immunity. *Id.* at 1204 (citing *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976)). Second, *Herman* observed that in certain cases a court may have "inherent authority to effectuate the defendant's compulsory process right by conferring a judicially fashioned immunity upon a witness whose testimony is essential to an effective defense." *Id.*

In *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980), we gave content to both bases of defense witness immunity when we vacated the sentences of certain defendants and remanded for evidentiary proceedings respecting these principles. In particular, we set out the requirements for invoking judicially fashioned defense witness immunity:

> [B]efore a court can grant immunity to a defense witness, it must be clear that an application has been made to the district court naming the proposed witness and specifying the particulars of the witness' testimony. In addition, the witness must be available and the defendant must make a convinc-

> ing showing sufficient to satisfy the court that the testimony which will be forthcoming is both clearly exculpatory and essential to the defendant's case. Immunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or if it is found to relate only to the credibility of the government's witnesses.

615 F.2d at 972 (footnote omitted).

In this case, Mollica had made no showing of governmental conduct which would warrant a grant of statutory immunity. There was no evidence of any attempt on the part of the prosecution to distort the facts of the case by keeping Stagno and Fimmano from testifying.[6] Nor was there evidence of any other governmental action or misconduct which would fall within the *Morrison-Herman* standard. As we said in *Smith*, "[a]bsent [such] prosecutorial misconduct, a defendant is foreclosed from insisting that statutory immunity be granted his witness." *Id.* at 968.

As for "judicially fashioned" immunity, Mollica clearly failed to make "an application . . . to the district court naming the proposed witness and specifying the particulars of the witness' testimony." *Id.* at 972. At no time during the revocation hearing did Mollica tell the district court what testimony either Stagno or Fimmano would give were they to be provided with immunity. The belated affidavit of Mollica's counsel, asserting that Fimmano would have exculpated Mollica had Fimmano been given immunity and testified, cannot cure the fact that no such representation was made to the district court at the hearing. Furthermore, there has never been

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6. Mollica suggests that the Government knew that the handwriting on the betting slips found in Stagno's bedroom was that of Fimmano. The record does not bear out this suggestion. Fimmano had testified on direct examination, but his testimony was stricken when he refused to answer particular questions on cross-examination.

any representation as to how Stagno's testimony would have exculpated Mollica. Under these circumstances, the district court did not err in refusing to grant Stagno and Fimmano the immunity which *Smith* authorizes.

V.

Conclusion

I agree that as to all issues raised on appeal by Mollica, other than the postponement/use immunity issue, the district court's order of May 18, 1981 should be upheld. However, because I would reverse and remand to the district court so that it might conduct further proceedings consistent with Mollica's postponement/use immunity argument (see Part III, *supra*), I must respectfully dissent from the judgment of the court affirming the district court's order.

SEITZ, *Chief Judge*.

In my view, the district court did not deprive appellant Mollica of any constitutional right by requiring him to choose whether to testify at his probation revocation hearing at the risk that his testimony or evidence derived therefrom might be used against him in a subsequent criminal trial. Also, I do not think it is a proper invocation of our supervisory power to require a district court either to postpone a probation revocation hearing based on pending state criminal charges until the resolution of those charges, or to grant the probationer use immunity. A postponement decision is a matter best left to the discretion of the district court, and use immunity is unjustified in this context because it may result in a substantial burden on the state law enforcement function. Finally,

although I believe the district court abused its discretion by basing its denial of Mollica's request for postponement or use immunity on a misperception of law, I would not remand to the district court for further proceedings because of the present posture of the case.

I.

On March 5, 1976 Mollica pleaded guilty to violations of 18 U.S.C. §1955 (conducting an illegal gambling business), 18 U.S.C. §1511 (conspiracy to obstruct law enforcement with intent to facilitate an illegal gambling business), and 18 U.S.C. §§1961-1963 (RICO). He was sentenced to five years' imprisonment and fined $15,000. The district court suspended his prison sentence and placed him on a five year term of probation pursuant to 18 U.S.C. §3651.

On February 18, 1981 Pittsburgh police officers conducted a search of a house owned by Donna Stagno. The police had obtained a warrant for this search based on information received from an undisclosed informant, who indicated that Mollica was conducting a telephone gambling business at the Stagno residence. The search produced several pieces of evidence substantiating the informant's allegation.

Based on this and other evidence gathered on February 18, Pennsylvania authorities charged Mollica with operation of a lottery, bookmaking, and conspiracy in violation of 18 Pa. Con. Stat. §§5512, 5514 and 903, respectively. On August 13, 1982 the Court of Common Pleas of Allegheny County, Pennsylvania granted a motion to suppress certain evidence implicating Mollica in the alleged criminal activity. The Commonwealth did not appeal the suppression order, and on August 13, 1982 the Court of Common Pleas granted a motion of the Commonwealth to dismiss the indictment.

Meanwhile, federal probation officials on April 27, 1981 had filed a petition in the district court to revoke

Mollica's probation. The petition alleged that the evidence produced by the February 18, 1981 search revealed that Mollica had violated a condition of his probation requiring him to refrain from violating any federal, state or local law. The district court entered an order on April 27, 1981 requiring Mollica to appear before the court on May 8, 1981 and show cause why his probation should not be revoked. The May 8, 1981 date was two days before Mollica's five-year term of probation would expire.

At the May 8 hearing, Mollica requested that the district court either postpone the probation revocation proceedings until after the disposition of the state charges or grant him use immunity. Fearing that his testimony at the probation revocation hearing would be used against him in the state criminal proceedings, Mollica contended that either postponement or use immunity was required by fundamental fairness.

The district court refused Mollica's request for postponement and proceeded with the revocation hearing. Mollica chose not to testify. The district court entered an order revoking Mollica's probation, from which Mollica brings this appeal.

II.

Mollica argues that "[w]here the prosecutor insists on conducting a probation hearing prior to trial on the state charges, then a limited use immunity therefore must arise in favor of the probationer under the privilege against self-incrimination of the U.S. Constitution." This Fifth Amendment guarantee, however, protects the individual only against *compelled* self-incrimination. *See Hoffa v. United States*, 385 U.S. 293, 303-04 (1966).

In *McGautha v. California*, 402 U.S. 183 (1970), *vacated on other grounds*, 408 U.S. 941 (1971), the Supreme Court held that no impermissible coercion resulted when a defendant in a state single-verdict trial system

was required to choose whether to stand on his right against self-incrimination at the risk that his failure to testify would be damaging on the issue of punishment. *Id.* at 217. I can perceive no principled basis for distinguishing *McGautha* from the instant case, in which Mollica was required to choose whether to stand on his right against self-incrimination at the risk that his failure to testify would be damaging concerning probation revocation.[1] Therefore, I cannot conclude that Mollica was under the kind of compulsion that violates the privilege against self-incrimination.

Mollica also argued before the district court that use immunity was necessary as a matter of "fundamental fairness". Although he did not elaborate further on this contention, I presume he meant to suggest that forcing him to choose between exercising his constitutional right to be heard in person at his probation revocation hearing, *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1982), and preserving his privilege against self-incrimination at the state criminal proceedings, violates due process.

I am not unappreciative of the difficulty of this choice. Yet, not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is constitutionally impermissible. *Corbitt v. New Jersey*, 439 U.S. 212, 218 (1978). The threshold question in this regard is whether compelling an election impairs to an appreciable extent any of the

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1. In *Brooks v. Tennessee*, 406 U.S. 605 (1971), the Supreme Court held unconstitutional a state statute that required a defendant desiring to testify in a criminal proceeding to do so before any other testimony for the defense was heard. *Id.* at 606. *Brooks* is distinguishable from the instant case because in *Brooks* the defendant was required to choose whether to stand on his right against self-incrimination at the risk that his failure to testify would be damaging on the issue of *guilt*. In my view, the risk of conviction and consequent punishment to a defendant presumed innocent until proven guilty is more coercive than the risk of added punishment to a probationer, such as Mollica, who already has been convicted.

policies underlying the constitutional rights asserted. *McGautha v. California*, 402 U.S. at 213 (state unified guilt-punishment criminal trial system does not violate due process; choice between exercising right of allocution at punishment stage and preserving privilege against self-incrimination at guilt stage does not appreciably undermine policies underlying either right).

As I have indicated, Mollica's forced election of rights did not violate his right against self-incrimination. Therefore, I must conclude also that this election did not impair to an appreciable extent any of the policies underlying that right. *McGautha v. California*, 402 U.S. at 217.

Neither did Mollica's forced election impair to an appreciable extent any of the policies underlying his due process right to be heard in person at his probation revocation hearing. Identification of the precise dictates of this due process right requires a careful balancing of the private interest that will be affected by the official action against the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1975).

The individual interests protected by the due process right to be heard in person at a probation revocation hearing include personal participation in the revocation process, and bringing to the court's attention evidence peculiarly within the probationer's own knowledge. Yet, neither of these interests is substantially undermined by a requirement that a probationer must choose whether to be heard at the expense of waiving the privilege against self-incrimination. *See McGautha v. California*, 402 U.S. at 220 (same individual interests, which also underlie due process right to be heard at sentencing assumed to exist for purpose of argument, not undermined by requiring defendant to risk that statements made regarding punishment will be damaging with regard to guilt).

By contrast, the Government's interests weigh heavily against relieving the probationer of the above election either by postponing probation revocation hearings or by granting the probationer use immunity. As I will later suggest, postponement may result in substantial expense and inconvenience to federal probation officials, while use immunity would impose on the government the substantial burden in a subsequent criminal prosecution of proving that its evidence was derived from a source wholly independent of the probationer's previously immunized testimony. Therefore, as I balance the *Mathews v. Eldridge* factors, I cannot say that the election required of Mollica deprived him of the due process right to be heard in person at his probation revocation hearing.

III.

Mollica argues in the alternative that this Court should promulgate a supervisory rule which requires a district court either to postpone a probation revocation hearing based on pending state criminal charges until the resolution of those charges, or to grant the probationer use immunity. I need not decide whether the supervisory rule proposed by Mollica would be the better practice, because I believe the subject matter of Mollica's so-called "dilemma" is ill-suited to a proper invocation of our supervisory power. Moreover, I am not convinced that there is any substantial need for such a rule, given the admission of the United States probation office that its general policy is to delay the institution of probation revocation proceedings until the disposition of state criminal charges. *See United States v. Tonelli*, 577 F.2d 194, 196 (3d Cir. 1978) (supervisory rule requiring that putative defendants be advised of Fifth and Sixth Amendment rights before testifying in grand jury proceeding unnecessary in light of Justice Department's adoption of this practice).

Whatever its source,[2] there is no doubt that this Court has supervisory power to promulgate rules of practice and procedure for the better administration of the judicial process. Clearly, however, not every problem faced by a district court is properly the subject of a supervisory rule. Instead, some matters are best left to the sound discretion of the district court. This is particularly the case when resolution of an issue demands the weighing and balancing of several factors, or when the district court is in a better position to resolve a dispute by virtue of its proximity to the facts.

In my opinion, the district court is in the best position to balance the several considerations relevant to whether probation revocation hearings based on state criminal charges should be postponed until the resolution of those charges. One of these considerations, for example, is the inconvenience that may result from an untimely motion for postponement. *United States v. Turkish*, 623 F.2d 769, 777-78 & n.5 (2d Cir. 1980) (district court's refusal to grant defense witness immunity did not deny constitutionally protected fairness because demand for immunity was untimely and would, if granted, have resulted in substantial inconvenience to prosecution), *cert. denied*, 449 U.S. 1077 (1981). In the instant case, Mollica did not make his request for postponement or use immunity until his probation revocation hearing had begun. For the district court to have

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2. Commentators have suggested that a court of appeals' supervisory power may be justified either as an inherent power, Hill, *The Bill of Rights and the Supervisory Power*, 69 Colum. L. Rev. 191, 195 (1969), or as a power impliedly delegated by Congress' enactment of the Court of Appeals Act. Schwartz, *The Exercise of the Supervisory Power by the Third Circuit Court of Appeals*, 27 Vill. L. Rev. 506, 514-25 (1981-82). It is unnecessary for me to decide whether either or both of these sources is the basis of the supervisory authority of the courts of appeals, since the Supreme Court has expressely affirmed the legitimacy of this power. *Bartone v. United States*, 375 U.S. 52, 54 (1963) (per curiam).

granted this request might have resulted in serious inconvenience; probation officials argued that several of their witnesses were from out of town, and could be returned to a second probation revocation hearing, if at all, only at added expense.

Similarly, the status of a pending state criminal proceeding may determine whether postponement is the appropriate course of action. For example, in the instant case postponement would not be a viable alternative at the present time, since there exist no pending criminal charges the disposition of which could mark the time at which the probation revocation hearing would be recommenced.

Postponement also might be inappropriate when the request for postponement occurs at the inception of the state criminal process. Because state criminal proceedings may continue for some time,[3] delay of a probation revocation hearing may result in the loss of evidence, the disappearance or death of witnesses, or other forms of prejudice to the government.

By contrast, it might cause federal probation officials little inconvenience if the district court were to grant postponement of probation revocation hearings when the state criminal trial is near completion. Presumably, the probation revocation proceedings could be resumed shortly, with little likelihood that the delay will have resulted in any harm to the government's case. In any event, the district court will be in the best position to assess the inconvenience that may result from a long delay, and to assign this inconvenience its proper weight.

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3. For example, in this case, had the district court granted Mollica's request for postponement on May 8, 1981, postponement would have resulted in a significant delay of the probation revocation proceeding, since the state charges against Mollica were not dismissed until August 13, 1982.

B. *Use Immunity*

Without doubt, a supervisory rule requiring district courts to grant use immunity to a probationer who faces the same sort of election as did Mollica would advance the federal interest in avoiding revocations of probation based on erroneous information or an erroneous evaluation of the need to revoke probation. *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972). Nevertheless, the Supreme Court has held that courts of appeals should not promulgate a supervisory rule implementing such a non-constitutionally required goal when the rule would impose a significant corollary burden on a co-equal branch of government. *See United States v. Payner*, 447 U.S. 727, 734-37 (1979) (court of appeals' use of supervisory power to suppress evidence seized in violation of fourth amendment rights of third party not before the court inappropriate because loss of probative evidence significantly burdens law enforcement efforts of executive branch). Similarly, this Court has declined to exercise its supervisory power when the result would be a significant encroachment on an integral function of state government. *See Poteet v. Fauver*, 517 F.2d 393, 398 (3d Cir. 1975) (declining to exercise supervisory power to order assignment of new judge for resentencing in state criminal proceeding out of respect for court system of equal sovereignty).

In the instant case, federal probation officials sought to revoke Mollica's probation based upon pending state criminal charges. Therefore, we are not confronted with the possibility that a grant of use immunity would impose a significant burden on federal law enforcement officials.

Rather, my objection to a supervisory rule requiring use immunity in the present context concerns the effect immunity would have on state law enforcement, an integral function of state government. *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). Specifically, granting the

probationer immunity would require the state to prove that evidence it seeks to use against a probationer in a subsequent criminal trial is derived from a source wholly independent of his previously immunized testimony.

As a general principle, immunization of the "fruits" of immunized testimony is necessary to satisfy the prospective witness that his testimony will not return to haunt him. *Cf. Kastigar v. United States*, 406 U.S. 441, 460 (1970) (immunity for "use" and "fruits" in federal use immunity statute necessary and sufficient to provide full protection required by privilege against self- incrimination). Requiring the government to prove that evidence it seeks to use against a probationer is derived from a source wholly independent of his previously immunized testimony is but a natural and necessary complement of "fruits" immunity.

Proving that evidence is derived from a source independent of previously immunized testimony would impose a substantial burden on the state prosecution in a subsequent criminal trial. Although the state may in some cases be able to satisfy the independent source burden by cataloguing or freezing the evidence obtained prior to the defendant's immunization, this is not so when a continuing investigation "disclose[s] vital evidence after, though not resulting from, the immunized testimony." *United States v. Turkish*, 623 F.2d at 775. If the state cannot meet its burden in such a case, the result will be the loss of potentially crucial evidence.

Moreover, when the state's investigation is ongoing, it may take measures in order to meet the independent source burden which are in themselves costly. For example, the state may decide that it is necessary to appoint a new team of investigators and prosecutors after the probationer has been granted immunity. *United States v. Turkish*, 623 F.2d at 778. Yet, this would result in the loss of the knowledge and experience of the first team of investigators and prosecutors, as well as much duplication of effort by the second-appointed team.

United States v. Thevis, 665 F.2d 616, 640 n.26 (5th Cir.), *cert. denied*, 103 S. Ct. 57 (1982). In recognition of these potential burdens, this Court has held that the possibility that a defense witness may be subject to future prosecution is a legitimate reason for denying him immunity. *United States v. Lowell*, 649 F.2d 950, 965 (3d Cir. 1981). Therefore, given these significant potential burdens on state law enforcement activities, I would decline to use our supervisory power to promulgate a rule requiring district courts to grant use immunity as an alternative remedy in this context.

IV.

Although in my view the decision whether to postpone probation revocation proceedings or to grant use immunity should be left with the sound discretion of the district court, in this case it appears that the district court may have denied Mollica's request for the wrong reason. Although the record in this case is not entirely clear, I believe it can be fairly read as indicating that the district court based its decision to deny Mollica's request for postponement on its interpretation of 18 U.S.C. §3651. Apparently, the district court interpreted section 3651 as granting it jurisdiction to revoke Mollica's probation only if it commenced the revocation hearing during his five year probationary term. Because postponement of Mollica's revocation hearing would have extended the proceedings beyond this term, the court thought postponement would have deprived it of jurisdiction to revoke his probation.

The other judges of this court have indicated, and I agree, that postponement beyond the five year probationary term would not have divested the district court of jurisdiction over Mollica. This is because the district court's April 27, 1981 order requiring Mollica to appear before the court and show cause why his probation should not be revoked fell within the five year statutory

period. Therefore, the district court's refusal to grant Mollica's request for postponement was apparently based on an erroneous application of section 3651.

The district court's error clearly is inconsistent with a sound exercise of discretion, and would call for a remand were it not for the procedural posture of this case. Because the Pennsylvania authorities have dismissed the criminal charges against Mollica which formed the basis of his probation revocation, postponement no longer remains a viable remedy. Moreover, it would be an abuse of discretion to grant Mollica use immunity, since immunity is not constitutionally required and would require the state, should it decide to reindict Mollica, to satisfy the "independent source" burden. Consequently, I believe a remand would be wholly ineffectual in affording Mollica the remedy to which he is entitled, a proper exercise of the district court's discretion concerning whether to postpone his probation revocation hearing or grant him use immunity.

I also would not remand to give Mollica a second chance to choose whether to testify at his probation revocation hearing. As I have indicated, the district court's misinterpretation of its jurisdiction deprived Mollica of a proper exercise of the court's discretion concerning whether to postpone his revocation hearing or grant him use immunity. The court's error did not, however, deprive Mollica of the right to choose whether to testify. Mollica exercised this right, choosing not to testify. No error of the district court entitles him to a reevaluation of this decision.

V.

Finally, I agree with the court that on rehearing, Mollica cannot invoke the Fourth Amendment as a ground for excluding the evidence obtained by the state authorities. I also agree that the district court did not err in failing to explain the reasons for resentencing Mollica

to his original five-year term of imprisonment, refusing to require the disclosure of the identity of the government's informant, or refusing to grant immunity to defense witnesses Stagno and Fimmano.

I would affirm the judgment of the district court.

GIBBONS, *Circuit Judge*, with whom Judge Aldisert joins, dissenting:

This court's judgment affirming the revocation of Mr. Mollica's probation is technically correct, since no majority of this court agrees upon a ground for modifying it. But while we recognize that since both of the positions we espouse are minority positions, and thus that the judgment must stand, we dissent from both majority holdings.

I. The Use Of Illegally Obtained Evidence in Parole Revocation Proceedings.

A majority of the court advances two reasons for the conclusion that illegally obtained evidence is admissible in a probation revocation proceeding. One is that a probationer, because he has already been found guilty of a crime, has only a "conditional" liberty. The other is that since the application of the exclusionary rule to probation revocation proceedings will not significantly enhance the deterrence of police misconduct it should not be applied. Neither reason is sound.

It is true that the procedural rules applicable to a criminal prosecution, such as jury trial and proof beyond a reasonable doubt, do not apply in a probation revocation proceeding. But it is a classic non-sequitur to suggest that, because the procedural rules of criminal prosecutions and of probation revocation proceedings are not

identical, persons on probation have a lesser interest in the zones of privacy and personal autonomy which the fourth amendment protects. This court recognized in *United States v. Hallman*, 365 F.2d 289 (3d Cir. 1966), that the fourth amendment protects a parolee from a warrantless seizure. It held that such illegally seized evidence could not be admitted in a subsequent counterfeiting case. Certainly that case ought to control on the full applicability of the fourth amendment to probationers, for no meaningful distinction can be drawn, for fourth amendment purposes, between a probationer and a parolee. Moreover, the *Hallman* court drew no distinction based upon the nature of the proceeding in which the illegally obtained evidence was to be used. From the point of view of the victim of a fourth amendment violation, the government's further invasion of constitutionally protected privacy rights by making use of the fruits of that invasion in a public forum is the same whether that public forum is a prosecution or a proceeding to revoke probation or parole. The public exploitation of the invasion of privacy continues and aggravates it. The court becomes a partner in that exploitation to exactly the same extent in both proceedings. Matters that should, under the law, have remained private are put to a public use, to the ongoing detriment of the victim. A peeping tom looking through a bedroom window commits an egregious invasion of privacy. If he titilates his friends with a description of what he observed in the bedroom, the invasion of privacy is magnified. If a court then affords him a public forum in which the private information becomes a public record, the court participates in that invasion of privacy and magnifies it to the maximum. The exclusionary rule prohibits the court from participating in illegal invasions of privacy by maximization of the dissemination of information which under the standards of privacy enshrined in the fourth amendment should remain private.

On this issue the majority disregards the court's involvement in the ongoing invasion of the victim's privacy interests by separating the exclusionary rule from those privacy interests. That majority holds that the rule is not a personal constitutional right of the party aggrieved, but only a device designed to deter violations of fourth amendment rights. It is indeed a rule to prevent violations of fourth amendment rights — violations by the court in compounding illegal invasions of privacy by further public exploitation of material that should have remained private in the first place.

Over a decade ago I outlined the reasons why the deterrence of police misconduct as the sole justification for the exclusionary rule is a snare and a delusion. Gibbons, *Practical Prophylaxis and Appellate Methodology: The Exclusionary Rule as a Case Study in the Decisional Process*, 3 Seton Hall L. Rev. 295 (1972). Almost everything that has occurred in fourth amendment jurisprudence since then has reinforced my conviction as to the unsoundness of the deterrence rationale. The majority opinion on the fourth amendment issue is a typical example. Proceeding from the assumption, unsupported by empirical evidence, that application of the rule in criminal trials does in fact have an effect on police conduct, it jumps to the equally unsupported assumption that non-application of the rule in parole revocation proceedings will have no encouraging effect. Our visceral reaction, and we confess it is only that, is that the case for a deterrence-encouragement rationale is stronger rather than weaker in the probation revocation context. The police, often less interested in convictions than in crime prevention, already have a great incentive in dealing with parolees or probationers to seek their incarceration under the much lower evidentiary standards applicable to revocation proceedings. The holding that illegally obtained evidence may be freely used in a probation revocation proceeding sends a strong signal to law enforcement personnel that the task of building a le-

gal case which would sustain a conviction may be shortcut in the interest of getting a probationer off the street by an invasion of his fourth amendments rights.[1] Our visceral reaction as to the rule's deterrence or encouragement of police misconduct is at least as probable as that of the majority on that issue.

Neither visceral reaction, however, is a sound basis for a ruling that the court should become an active participant in an ongoing illegal invasion of constitutionally protected privacy interests. The only valid reason for the exclusionary rule is that advanced by Justices Holmes and Brandeis years ago in their notable dissents in *Olmstead v. United States*, 277 U.S. 438, 469, 471 (1928). The government plays "an ignoble part" when it commits illegal invasions of privacy. *Id.* at 470 (Holmes, J., dissenting). The evidence, therefore, is excluded "in order to preserve the judicial process from contamination." *Id.* at 484 (Brandeis, J., dissenting). The contamination to which Brandeis referred was that caused by the active participation of the court in providing a public forum for the widespread dissemination and public use of information which should have remained private.

Brandeis was one of the first scholars to recognize the importance of individual privacy as a basic liberty. Warren and Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193 (1890). Many years elapsed before a majority of the Supreme Court accepted his normative judgment as

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1. An amicus curiae brief filed in the Supreme Court by Dan Johnston, county attorney for Polk County, Iowa, in Illinois v. Gates, ___ S.Ct. ___ (1983), contended that the exclusionary rule is accountable for the extremely low number of dismissals of prosecutions because of suppression of evidence, and that a retreat from Mapp v. Ohio, 367 U.S. 643 (1961), will be perceived by the law enforcement community as a signal that the fourth amendment should not be taken seriously. *See* argument of counsel in Illinois v. Gates, 51 U.S.L.W. 3643, 3645 (March 8, 1983). Mr. Johnston's visceral reaction is informed by law enforcement experience which the members of this court lack.

to the value of that liberty. Now, we concede, this court's majority is swimming with a strong tide against recognition of the value of privacy rights.[2] The head count among the courts of appeals on the precise issue of admissibility of illegally obtained evidence in probation revocation proceedings is evidence of that tide. In this court *United States v. Hallman*, 365 F.2d 289 (3d Cir. 1966), while technically distinguishable, put us, at least until today, in the same normative camp as the Fourth Circuit. *United States v. Workman*, 585 F.2d 1205, 1211 (4th Cir. 1978). We would have this circuit stay there. It is offensive to cast federal judges in the role of peeping toms once removed, presiding over a public forum for the public dissemination of information which under the Constitution was and should have remained private. Moreover, embracing that ignoble role, as the majority on that issue does, will in the long run erode the moral authority of the court, which is its only real source of power.

We would hold that the court erred in refusing to hold a hearing to determine whether the evidence it admitted in the probation revocation proceeding was illegally obtained.

II. The Privilege Against Self-Incrimination in Parole Revocation Proceedings

Judge Garth's separate opinion, which unfortunately does not command a majority, outlines the reasons why, when the executive branch of the federal government calls upon the article III judiciary to impose the sanction of revocation of probation, the court should insist upon either use/fruits immunity so that the probationer may testify or postponement of the revocation

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2. *But see* Franks v. Delaware, 438 U.S. 154 (1977) (warrant based on knowingly false affidavit should be voided and fruits of search suppressed).

hearing until incrimination from testimony is no longer likely. We agree with his proposed holding. We note that his reliance on a judge-made procedural rule not specifically required by a statute or the Constitution is entirely consistent with the Supreme Court's latest pronouncement on the supervisory powers of the federal courts.

> The purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights . . .; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury . . .; and finally, as a remedy designed to deter illegal conduct. . . .

United States v. Hastings, 51 U.S.L.W. 4572, 4574 (U.S. May 23, 1983) (citations omitted). All three purposes apply here. The rule Judge Garth proposes implements a probationer's privilege against self-incrimination. It also assures that the parole revocation proceeding will have the benefit of all evidence possibly favorable to the probationer, and thus that the decision is made on appropriate considerations. Finally, it deters reliance on probation revocation proceedings in circumstances in which the prosecuting authorities could not prove a substantive offense, and prevents those authorities from placing the probationer in the position of leaving a weak case unanswered or running the risk of strengthening it by self-incrimination.

Thus we dissent as well from the holding that probation revocation proceedings should go forward, absent a grant of use/fruits immunity, in the face of a valid assertion that testimony by the probationer would tend to incriminate him in respect to a pending criminal charge.

SLOVITER, *Circuit Judge*.

1. I agree with Chief Judge Seitz that appellant Mollica was not deprived of any constitutional rights when the district court refused to postpone Mollica's probation revocation hearing or to grant him use immunity. I agree that we should not enunciate a supervisory rule to cover this situation for the reasons set forth in Chief Judge Seitz' opinion.

2. I agree with Judge Gibbons that the district court should have held a hearing to determine whether the challenged evidence was illegally obtained. In recent decisions, the Supreme Court has grounded its rationale for the rule more on pragmatism than on principle: "The [exclusionary] rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States v. Calandra*, 414 U.S. 338, 347 (1974). *See United States v. Janis*, 428 U.S. 433, 446 (1976). Even if viewed in that light, I am unpersuaded that probation revocation proceedings should stand on a significantly different footing than criminal trials for this purpose. Although empirical evidence is unhappily unavailable, as the Court has recognized, *see id.*, it is reasonable to assume that the deterrent effect on police misconduct would be strengthened if the exclusionary rule is applied in an unwaivering and undeviating fashion whenever the evidence is sought to be used in a proceeding which may subject the victim of the search to imprisonment. *See United States v. Workman*, 585 F.2d 1205, 1211 (4th Cir. 1978). Therefore, I would remand for the purpose of directing the district court to hold a suppression hearing. Since a majority of the court has not accepted that position, I vote to affirm.

ADAMS, *Circuit Judge*, dissenting from the judgment of affirmance.

I join Judge Garth's opinion except for part III, which promulgates a supervisory rule regarding use immunity and postponement of probation revocation hearings. I would vacate and remand, not on the basis of the supervisory rule, but to enable Mollica to testify if he so elects.

I.

When Mollica's counsel moved for postponement of the probation revocation hearing, the district court was concerned that postponement beyond the five year probationary period might imperil its jurisdiction over Mollica. As a result, the district court insisted on going forward. This Court today makes clear that the concern of the district court was not well founded.

If the district court had the benefit of this Court's reasoning on the jurisdictional issue, it might have exercised its discretion to postpone the revocation hearing pending further proceedings on the state charges. Had there been a postponement, Mollica might have chosen to testify when the hearing was held; indeed Mollica's counsel represented to this Court at oral argument that Mollica would have testified. When a district court's exercise of discretion is predicated on a misapprehension of the law, the appropriate course for an appellate court is to resolve the legal question and remand the matter so that the district court can proceed in light of the clarification. This course is especially appropriate when, as in this case, the right of the probationer to testify appears to have been compromised by the district court's uncertainty. Although the district court did not deny Mollica the right to testify, it needlessly burdened the exercise of that right.

Since the district court's decision, the state criminal charges against Mollica have been dismissed. Thus, the

issue before the district court, whether to postpone the revocation hearing while the state proceedings were pending or grant Mollica use immunity, would not be present on remand. Chief Judge Seitz contends that the district court on remand must necessarily hold the hearing without granting immunity. Even if this view is correct, it does not follow that remand is unwarranted. Fairness and caution support a decision to remand because Mollica may now choose to testify at the probation revocation hearing, even in the absence of immunity, inasmuch as the state criminal charges have been dropped and might not be revivable.

II.

The proposed supervisory rule requires — without exception — that a district court postpone probation revocation proceedings or grant use immunity to probationers who wish to testify, but are unwilling to do so in the absence of a postponement. The rule is based upon Judge Garth's conception of the "better practice"; it is not dictated by precedent, statute, or constitutional provision. This rule, as I see it, is deficient on three grounds: (a) it is unduly vague and provides insufficient guidance for district courts; (b) it sweeps too broadly and represents a rigid approach in an area better left to the discretion of district judges and probation officials; and (c) it constitutes an improvident use of this Court's supervisory power.

A.

Although the supervisory rule purports to prescribe a definitive procedure for district courts to follow, its contours are obscure and incomplete. Judge Garth makes clear that revocation proceedings should be postponed, but he sets no time limits on the postponement. In the case at hand, he would apply the postponement rule, even though charges are no longer pending against

Mollica and the revival of any previous charges is speculative. Judge Garth's proposal might well constrain a district court for the entire period of the statute of limitations. Mollica's hearing, for example, could be delayed for at least two years from the date he allegedly committed the offense and possibly much longer.[1] In a case involving murder or voluntary manslaughter, postponement could be indefinite.[2]

The supervisory rule is phrased in such a way as to suggest that postponement during the pendency of criminal charges would be the norm and use immunity, the exception. Judge Garth does not explain why this preference exists, but he requires that the district court "articulate on the record the reasons for" choosing one course over another. No reason for this requirement is advanced, but presumably the rationale is to facilitate appellate review. Judge Garth thus implies that the district court's discretion to choose postponement rather than use immunity is limited in some way. Yet there is no hint as to what those limitations might be.

If, instead of propounding a rule, Judge Garth had merely enumerated various factors that could inform the district court's exercise of discretion, the failure to articulate a rationale would be less objectionable. But

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1. Mollica was charged under 18 Pa. Cons. Stat. Ann. §§5512, 5514, & 903(a)(1) (Purdon 1973). At the time he was charged, the applicable statute of limitations was two years, 42 Pa. Cons. Stat. Ann. §5552 (Purdon 1981), but the time during which the state charges were pending would have been excluded from this period (*id.* §5554). Pennsylvania has recently amended §5552 to extend the limitations period for such charges to five years. Act No. 1982-122, S.B. No. 563, 2 Pa. Legisl. Service 1982, 587 (Purdon). We express no view as to whether this amendment is applicable to Mollica. Even before the 1982 amendment, many offenses had five year limitations periods.

2. *See, e.g.*, 42 Pa. Cons. Stat. Ann. §5551 (Purdon 1981) (unlimited period for prosecution of murder or voluntary manslaughter).

when we take it upon ourselves to ordain that the district court adhere to what we consider the "better practice" or face reversal, it is incumbent upon us to delineate that practice with some precision.

B.

Even assuming that the rule could be more precisely crafted, its rigid application would create an unsatisfactory choice for district courts and prosecutors contemplating probation revocation proceedings: they must grant use immunity or postpone. Yet there might well be exceptional circumstances in which the Government can demonstrate a compelling need to avoid postponement, but in which a grant of immunity would be unacceptable. The rule would also have unfortunate consequences in the ordinary probation revocation case in which use immunity is granted. The probationer's testimony will often have little effect on the outcome of a revocation proceeding; the use immunity requirement might do no more than burden the state in subsequent criminal trials with "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled [immunized] testimony." *Kastigar v. United States*, 406 U.S. 441, 460 (1972).

In cases involving judicially created use immunity for defense witnesses, we require that the defendant show that the proferred testimony is both clearly exculpatory and essential to his case. *Government of Virgin Islands v. Smith*, 615 F.2d 964, 972 (3d Cir. 1980). Even *Smith* may have expanded judicial power too far. The Supreme Court has recently declared that "[n]o court has authority to immunize a witness." *Pillsbury Co. v. Conboy*, 51 U.S.L.W. 4061, 4064 (U.S. Jan. 11, 1983). Although this statement appears in the context of a discussion of defense witness immunity pursuant to statute, the Court may have meant to express the view that

the judiciary lacks even the inherent, nonstatutory power to immunize a witness. If the district court lacks the authority to immunize a witness, it is questionable whether it possesses the inherent power to immunize probationers.

Probation revocation proceedings do not require special treatment. Immunity seems no more necessary than it does when a defendant faces multiple prosecutions, perhaps in both federal and state court, for crimes arising out of the same or a related incident. To be sure, probation revocation proceedings involve a lower standard of proof and more relaxed rules of evidence and procedure than do parallel criminal trials,[3] and probationers consequently may feel compelled to testify. However, these procedural differences do not justify a blanket supervisory rule, and Judge Garth does not so suggest.

The district court should have the discretion to postpone revocation hearings without being required to grant use immunity. An appellate court cannot anticipate all the problems that might arise in individual cases. Because of the difficulties associated with the sole alternative to postponement, use immunity, the district court may be forced to postpone many hearings it believes for good reason should be held promptly.

C.

Even assuming that the rule proposed could be made sufficiently precise and flexible, I do not agree that the promulgation of such a rule constitutes an appropriate exercise of our supervisory power. Unlike the rules of practice in federal courts, this supervisory rule has not been promulgated under the exacting procedures estab-

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3. For example, we hold today that the exclusionary rule does not apply in probation recovation proceedings.

lished by the Judicial Conference of the United States pursuant to 28 U.S.C. §331 (1976).[4] Nor was the rule published in proposed form, subjected to comment and criticism, reported to elected public officials for modification or disapproval, or consolidated in an accessible format. Deviation from the carefully delineated path established for the adoption of the federal rules should occur only in limited circumstances. These procedures and the policy favoring uniformity among the federal circuits make the analogy to state supervisory rules inapposite. *See* typescript, *supra*, at 19-20.

Although this Court has promulgated supervisory rules on a number of occasions, they generally address matters peculiarly within the province of the judiciary.[5] A survey of the case law indicates that such rules are relatively narrow in compass and relate primarily to the regulation of practices followed by judges, the admissibility of evidence, the supervision of grand juries, and the conduct of counsel in court. *See* Schwartz, *supra* note 4, at 509-12. By contrast, the rule proposed today has a direct impact on the prerogatives of another branch of the federal government as well as on the prerogatives of the states. While such incursions are not unprecedented, this Court, as a matter of general policy, has rarely taken such a drastic step in the absence of a constitutional mandate.[6] It is apparent that encroachments of the kind advanced by the majority should be

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4. The process by which federal court rules are adopted is summarized in Schwartz, *The Exercise of Supervisory Power by the Third Circuit Court of Appeals*, 27 VILL. L. REV. 506, 539-40 (1982).

5. *See generally* Note, *A Separation of Powers Approach to the Supervisory Power of the Federal Courts*, 34 STAN. L. REV. 427 (1982); Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963).

6. *See* Schwartz, *supra* note 4, at 509 n.15 and 527-51.

7. *Cf.* Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980) (requiring judicially created immunity, under certain conditions, to vindicate constitutional right to fair trial); United

based on more than notions of what constitutes the "better practice."

A proper regard for our limited role would counsel that no rule issue in the absence of a showing that the rule is needed. There is no evidence, nor any reason to believe, that the absence of a special rule created significant problems in this case.[8] Had it not been for the jurisdictional issue which the Court resolves today, the probation office undoubtedly would have followed its usual policy and awaited the disposition of the pending state criminal charges before seeking a revocation hearing. If the probation officials had sought an earlier hearing, the district court most likely would have denied the request. Only a misunderstanding about the district court's jurisdiction, and not the absence of a supervisory rule, prevented the postponement of Mollica's hearing while state proceedings were pending. The rule may well be a solution to a nonexistent problem.

A supervisory rule governing the timing of revocation hearings might be legitimate; although no federal guidelines address the issue, the subject is arguably within the traditional competence of the courts. *See* Schwartz, *supra* note 4, at 539-40. Nonetheless, the absence of political accountability, the lack of procedural safeguards, the intrusion on prosecutorial discretion,

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States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978) ("a case might be made that the court has inherent authority to effectuate the defendant's compulsory process right by conferring a judicially fashioned immunity upon a witness whose testimony is essential to an effective defense"), *cert. denied*, 441 U.S. 913 (1979); United States v. Inmon, 568 F.2d 326, 333 (3d Cir. 1977) (defendant given limited use immunity because he "may not be required, as the cost of litigating what he and his counsel believe to be a valid fifth amendment double jeopardy claim, to waive the fifth amendment privilege against self-incrimination in a later trial").

8. *See United States v. Hastings*, 51 U.S.L.W. 4572, 4574 (U.S. May 23, 1983) (supervisory rule inappropriate when the error to which the rule is addressed is harmless).

and the superfluity of a rule absent a showing of need, all suggest circumspection in the exercise of our supervisory power. If some guidance for district courts is advisable, we would do better, I believe, to set forth the considerations that should inform the exercise of discretion by district judges.

III.

Despite the fact that nine judges of this Court would remand, the opinion announcing the judgment of the court proceeds on the theory that we must affirm the judgment of the district court because no *single* justification for remanding commands a majority. I disagree with both the abstract proposition and its applicability here.

Ordinarily, a judgment represents the agreement of a majority of the members of a court that it is appropriate to dispose of a case in a particular way. It is by no means essential that a rationale supporting a valid judgment also enjoy the majority's favor. Indeed it is not uncommon for a reversal or a remand to be based on a variety of grounds, none of which has sufficient support to become binding precedent. *See, e.g., Wolman v. Walter*, 433 U.S. 229 (1977); *Tilton v. Richardson*, 403 U.S. 672 (1971). While such decisions may frustrate a court's role of providing guidance for lower courts and thus constitute an abdication of its responsibility to those "depending on it for direction," Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1128 (1981), the absence of a consensus rationale does not invalidate the court's judgment as to a particular result. To hold otherwise would require all appellate courts to affirm when a majority supports a contrary disposition.

In the present case, the district court could not invoke the exclusionary rule on remand or grant use immunity, since a majority of this Court rejects both options. But three judges (Adams, Hunter, and Becker)

would remand to ensure that Mollica's right to testify was not compromised by the lower court's erroneous concern regarding its jurisdiction,[9] and I do not believe that a majority of this Court has foreclosed that option.

Indeed the only disposition that appears inconsistent with those opinions is an affirmance. It is scant consolation to Mollica that nine judges of this Court have concluded that his rights may have been violated in a proceeding which imposed a five year sentence.

Judge Hunter and Judge Becker join in this dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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9. Although, on remand, Mollica would again face the dilemma of whether to testify, he might now decide for strategic reasons that he should. He might no longer care about giving evidence to the state if he believes that the charges will not be reinstated or will carry relatively little sanction. Alternatively, he might be so concerned with the federal probation revocation proceedings that he might want to testify in the hopes of exculpating himself.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1936

UNITED STATES OF AMERICA

v.

JOHN BAZZANO, JR. a/k/a "JOHNNY", a/k/a "J"; JOSEPH DE MARCO a/k/a "JOE"; JOSEPH CHARLES YIMIN a/k/a "BULL"; CHARLES PATRICK KELLINGTON a/k/a "CHUCK"; FRANCIS DATTALO a/k/a "FRANK", a/k/a "HOB"; ATTILIO POLICASTRO a/k/a "FLAT TOP"; PRIMO VICTOR MOLLICA a/k/a "XG"; JOHN FRANKLIN MATZ a/k/a "JACK", a/k/a "MAYOR"; DAVID RANKIN GUFFEY a/k/a "CHIEF", a/k/a "CLAIRTON CHIEF"; JOHN REGIS WARD a/k/a "JP", a/k/a "WARD"; PETER PAUL ORSINI a/k/a "PETE", a/k/a "PETE ORSI"; DOMINIC PAUL SERAPIGLIA a/k/a "WILSON CONSTABLE"; THOMAS C. POLJAK a/k/a "ELIZ CHIEF"; GEORGE B. HINES a/k/a "ELIZ CONSTABLE"
Primo Mollica, *Appellant*

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by appellant, Primo V. Mollica, in the above entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who

concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

LEONARD I. GARTH
Circuit Judge

DATED: July 20, 1983

ADAMS, *Circuit Judge*, Statement Sur Petition for Rehearing:

The petition for rehearing filed in this case confirms a number of propositions that make remand appropriate. Mollica now makes it quite clear that if there were a remand he would testify without a grant of immunity at a probation revocation hearing and that his testimony would demonstrate that the conditions of his probation had not been violated. Despite these statements, Mollica must now begin a five year term of imprisonment as a result of having asserted a constitutional claim before the district court. Since this seems manifestly unfair and, indeed, inconsistent with the federal courts' role in protecting constitutional rights, I vote for rehearing.

There is another reason why rehearing is in order. Even though a majority of the judges sitting in banc believes that Mollica should have an opportunity to be heard, the judgment compelling revocation of probation comes about because no single rationale for remand can command a majority. Such a result appears inconsistent with the approach taken by the Supreme Court of the United States in the recently decided *Guardians Associ-*

ation v. Civil Service Commission of the City of New York, 51 U.S.L.W. 5105 (U.S. June 28, 1983).

Judge Hunter and Judge Becker join in this statement.

WEIS, *Circuit Judge*, Statement Sur Petition for Rehearing:

Although I continue to believe that Mr. Mollica was entitled to use immunity had he chosen to testify, his willingness to forego that protection has brought about a significant change in the posture of this case. In view of the present circumstances, I vote for rehearing.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-1936

UNITED STATES OF AMERICA

vs.

JOHN BAZZANO, JR., a/k/a "JOHNY", a/k/a "J"; JOSEPH DE MARCO a/k/a "JOE"; JOSEPH CHARLES YIMIN, a/k/a "BULL"; CHARLES PATRICK KELLINGTON a/k/a "CHUCK"; FRANCIS DATTALO a/k/a "FRANK" a/k/a "HOB"; ATTILIO POLICASTRO a/k/a "FLAT TOP"; PRIMO VICTOR MOLLICA a/k/a "XG"; JOHN FRANKLIN MATZ a/k/a "JACK" a/k/a "MAYOR"; DAVID RANKIN GUFFEY a/k/a "CHIEF" a/k/a "CLAIRTON CHIEF"; JOHN REGIS WARD a/k/a "JP" a/k/a "WARD"; PETER PAUL ORSINI a/k/a "PETE" a/k/a "PETE ORSI"; DOMINIC PAUL SERAPIGLIA a/k/a WILSON CONSTABLE; THOMAS C. POLJAK a/k/a "ELIZ CHIEF"; GEORGE B. HINES a/k/a "ELIZ CONSTABLE"

Primo Mollica,
Appellant

(D.C. Crim. No. 75-00192-07)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge;* ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Penn-

sylvania and was argued by counsel on February 4, 1982 and reargued before the Court in banc on November 8, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered May 18, 1981, be, and the same is hereby affirmed.

ATTEST:

Clerk

June 17, 1983

Certified as a true copy and reissued in lieu of a formal mandate on September 9, 1983.

ATTEST:

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

APPENDIX B

LIST OF UNITED STATES SUPREME COURT DECISIONS (1970-1983) REVERSING CRIMINAL CONVICTIONS OR SENTENCES IN THE ABSENCE OF A MAJORITY RATIONALE

Welsh v. United States, 398 U.S. 333 (1970) (conviction reversed in 4+1-3 vote); *Coleman v. Alabama*, 399 U.S. 1 (1970) (conviction reversed in 4+1+1-2 vote); *Baldwin v. New York*, 399 U.S. 66 (1970) (conviction reversed in 3+2-3 vote); *United States v. Jorn*, 400 U.S. 470 (1971) (grant of motion to dismiss information upheld 4+2-3); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (conviction reversed in a 4+1-4 vote); *Loper v. Beto*, 405 U.S. 473 (1972) (writ of habeas corpus granted in 4+1-4 vote); *Peters v. Kiff*, 407 U.S. 493 (1972) (defendant found to have standing to challenge jury composition in criminal trial by vote of 3+3-3); *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) (conviction reversed in a 4+1-1 vote); *Woodson v. North Carolina*, 428 U.S. 28 (1976) (death sentence set aside by 3+2-4 vote); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (death sentence set aside by 3+2-4 vote); *Gardner v. Florida*, 430 U.S. 349 (1977) (death sentence set aside in 3+1+1+1+1-2 vote); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (conviction reversed by vote of 4+1-4); *Coker v. Georgia*, 433 U.S. 584 (1977) (death sentence set aside by 4+1+1+1-2 vote); *Ballew v. Georgia*, 435 U.S. 223 (1978) (conviction reversed by 2+1+3+3 vote); *Lockett v. Ohio*, 438 U.S. 586 (1978) (death sentence set aside in 4+1+1-2 vote); *Bell v. Ohio*, 438 U.S. 637 (1978) (death sentence set aside in 4+1+1-1 vote); *Godfrey v. Georgia*, 446 U.S. 420 (1980) (death sentence set aside by 4+2-3 vote; *Brown v. Louisiana*, 447 U.S. 323 (1980) (conviction reversed in 4+2-3 vote); *Walter v. United States*, 447 U.S. 649 (1980) (conviction reversed in 2+2+1-4 vote); *Wood v. Georgia*, 450 U.S. 261 (1981) (conviction reversed in 4+1-3 vote); *Estelle v. Smith*, 451 U.S., 454 (1981) (death sentence set aside in 4+2+3 vote); *Robbins v. California*, 453 U.S. 420 (1981) (conviction re-

versed by 4+1+1-3 vote); *Connecticut v. Johnson,* U.S. , 103 S.Ct. 969, 74 L.Ed. 2d 823 (1983) (conviction reversed by 4+1-4 vote).

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No. 83-628

In the Supreme Court of the United States

OCTOBER TERM, 1983

PRIMO MOLLICA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the en banc court of appeals erred in affirming the judgment of the district court when a different majority of the court of appeals agreed with the district court's disposition of each of the issues raised.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A57) is reported at 712 F.2d 826.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1983 (Pet. App. A61-A62). A petition for rehearing was denied on July 20, 1983 (Pet. App. A58-A60). On September 6, 1983, Justice Brennan extended the time in which to file a petition for a writ of certiorari to October 18, 1983, and the petition was filed on October 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1976, petitioner pleaded guilty in the United States District Court for the Western District of Pennsylvania to charges of racketeering, in violation of 18 U.S.C. 1961 *et seq.*, conducting an illegal gambling business, in violation

of 18 U.S.C. 1955, and conspiracy to obstruct law enforcement with intent to facilitate an illegal gambling business, in violation of 18 U.S.C. 1511. He was sentenced to five years' imprisonment and fined $15,000, but his prison term was suspended in favor of five years' probation. Pet. App. A3.

On February 19, 1981, petitioner was charged by Pennsylvania authorities with operation of a lottery, bookmaking, and conspiracy. The basis of this charge was evidence obtained in a search conducted by the Pittsburgh police pursuant to a warrant. Federal probation officials then moved for revocation of petitioner's probation on the ground that the conditions of his probation required him to refrain from violating any federal, state, or local law. An evidentiary hearing on the probation revocation petition was set for May 8, 1981, two days before petitioner's five-year term of probation expired. Pet. App. A3.

Petitioner sought to postpone the probation revocation proceedings until after the disposition of the state charges. Petitioner also requested use immunity so that any statements he might make in the revocation hearing could not later be used in his criminal trial. The district court declined to delay the proceedings and denied petitioner's request for immunity. Petitioner did not testify at the hearing. The district court also denied petitioner's motion to suppress the evidence that had been seized by the Pittsburgh police officers, holding that the exclusionary rule did not apply to probation revocation proceedings. Pet. App. A3-A4.[1]

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[1] A state court subsequently suppressed the evidence obtained in the search, and the State dismissed its charges against petitioner (Pet. App. A5).

On the basis of the evidence presented at the hearing, the district court found that petitioner had violated the Pennsylvania lottery and bookmaking statutes. It revoked his probation and imposed a five-year term of imprisonment. Pet. App. A4-A5.

2. The ten judges of the court of appeals, sitting en banc, affirmed the judgment of the district court (Pet. App. A1-A57).[2] The court of appeals was unanimous in several of its holdings: that the district court had jurisdiction to revoke petitioner's probation, even though its order was entered after the term of petitioner's probation had expired; and that the district court did not err in failing to state its reasons for the sentence it imposed, in not ordering disclosure of an informant's identity, and in refusing to grant immunity to defense witnesses other than petitioner (*id.* at A17-A19, A25-A30).

By a vote of six to four, the court held that the Fourth Amendment exclusionary rule does not apply to probation revocation proceedings. Judges Garth, Weis, Seitz, Adams, Hunter, and Becker formed the majority on this issue; Judges Gibbons, Aldisert, Sloviter, and Higginbotham dissented. Pet. App. A6, A8-A16, A41, A42-A46, A48, A49, A57.

Petitioner also contended that the district court was required to choose between postponing the probation revocation hearing until the state criminal prosecution was completed and granting him use immunity for any testimony he chose to give at the probation revocation proceeding. By a vote of six to four, the court of appeals rejected petitioner's contention, declining to adopt a supervisory

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[2]The panel had adopted a supervisory rule that probation revocation proceedings should ordinarily await resolution of the criminal charges on which they are based. Failing that, the panel ruled, use immunity should be granted to the probationer.

rule requiring district courts either to postpone probation revocation proceedings or to grant use immunity in circumstances like those present here. The court determined instead that the matter should be left to the district judge's discretion. Judges Seitz, Adams, Hunter, Becker, Sloviter, and Higginbotham formed the majority on this issue (see Pet. App. A6, A30, A48, A50-A56, A57); Judges Garth, Aldisert, Weis, and Gibbons dissented (*id.* at A6, A19-A20).

Finally, three judges, although believing that a supervisory rule was inappropriate, urged that the case be remanded to the district court to give petitioner an opportunity to testify if he now chose to do so. These judges — Judges Adams, Hunter, and Becker — reasoned that the district court's decision not to postpone the probation revocation hearing may have been influenced by its concern that such a postponement would divest it of jurisdiction to revoke petitioner's probation — a concern that the court of appeals had unanimously decided was unfounded. Pet. App. A49-A50. No other judges agreed that a remand was needed for this reason.

Because there was a majority in favor of the district court's rulings on each issue, the court of appeals affirmed the revocation of petitioner's probation (Pet. App. A7). The court reasoned (*ibid.*): "[I]t is apparent that the differing grounds on which these various votes for remand are rested cannot be reconciled so as to yield a majority vote for a remand with consistent instructions to the district court as to the manner in which it is to proceed." Judges Adams, Hunter, and Becker believed that a remand was the proper disposition (*id.* at A56-A57).

ARGUMENT

1. Petitioner does not challenge the merits of any of the court of appeals' rulings. His sole contention is that, given the views of the various members of the court, the proper disposition would have been to vacate the order revoking

probation and remand for further proceedings. Specifically, petitioner urges that this case resembles those in which a court reverses a judgment without majority agreement on a single rationale and announces its judgment in a plurality opinion.

This is not a case, however, in which a majority agreed on a certain legal proposition dispositive of the case but there happened to be no majority for any particular line of reasoning supporting that proposition. In this case, there was no majority favoring petitioner on *any* issue. It was purely fortuitous that all three issues came before the court on the same appeal, and the court of appeals did not err in refusing to allow this fortuity to affect the outcome of the case.

If, for example, the questions whether the exclusionary rule applies to probation revocation proceedings and whether to adopt the supervisory rule advocated by petitioner had already come before the court of appeals in earlier cases, the court would have decided that the exclusionary rule did not apply, and it would have declined to adopt the proposed supervisory rule. Those holdings would have been stare decisis by the time petitioner's case reached the court, and petitioner would have received no votes on either issue; a clear majority would then have voted to affirm the revocation of his probation.

Indeed, the three issues on which the court of appeals was divided might have arisen on separate appeals in petitioner's case itself.[3] Petitioner would have lost each appeal by a clear majority; the revocation of his probation would have been affirmed, by a clear majority, even though it resulted

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[3]This might have happened if a party successfully sought interlocutory review, or if a ruling of the district court on a particular issue caused the probation revocation petition to be dismissed and the government appealed successfully on that issue.

from a district court proceeding substantively identical to the one that actually occurred here.

The court of appeals acted reasonably in declining to give petitioner a windfall solely because his various contentions happened to arise on the same appeal. We do not suggest that the court was required to act in this fashion, or that a single rule can be devised to cover unusual situations such as this. But the court of appeals has some discretion to determine which result would be "just under the circumstances" (28 U.S.C. 2106), and the court decided, by a vote of seven to three, that an affirmance was the just result here.

The fact that some of the judges who voted to affirm also expressed individual views that agreed with petitioner's on some of the issues does not entitle petitioner to a reversal; those judges, after considering their colleagues' views, made the reasonable decision to vote for affirmance. They in effect decided that, given their colleagues' views, institutional considerations warranted them in treating their own views on the exclusionary rule or supervisory rule issues in the way they might treat their disagreement with a binding precedent — as a subject for discussion but not a determinant of their votes.

2. Petitioner also appears to suggest (Pet. 15-16) that because four judges — Judges Garth, Aldisert, Gibbons, and Weis — urged the adoption of the supervisory rule advocated by petitioner, those judges necessarily must have agreed with Judges Adams, Hunter, and Becker that the case should have been remanded to allow petitioner another opportunity to decide whether to testify. But Judge Garth and the others who joined his opinion expressly considered and rejected Judge Adams's view (Pet. App. A24-A25 & n.5). They plainly did not agree with Judge Adams that the district court was influenced, in exercising its discretion not to postpone the revocation proceeding, by the concern that

a postponement would divest it of the power to revoke probation, and they therefore considered a remand unnecessary. There is no reason to believe that these judges misunderstood their own views. The fact that petitioner is *now* willing to testify, as he insists (Pet. 16), does not entitle him to a second chance; he had an opportunity to testify earlier, and he declined to exercise it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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